

K337HOR1

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 SAUL HOROWITZ,

4 Plaintiff,

5 v.

17-cv-7742 (JPO)

6 NATIONAL GAS & ELECTRIC, LLC, et al.,

7 Defendants.

Trial

8 -----x
9 New York, N.Y.
10 March 3, 2020
11 9:15 a.m.

12 Before:

13 HON. J. PAUL OETKEN

14 District Judge

15 APPEARANCES

16 KING & SPALDING LLP

Attorneys for Plaintiff

17 BY: RICHARD T. MAROONEY, JR., ESQ.

ISRAEL DAHAN, ESQ.

18 RYAN GABAY, ESQ.

19 MORGAN, LEWIS & BOCKIUS LLP

Attorneys for Defendants

20 BY: TROY S. BROWN, ESQ.

MICHELLE PECTOR, ESQ.

21 DANA E. BECKER, ESQ.

JARED WILKERSON, ESQ.

22 SU JIN KIM, ESQ.

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Lancaster - redirect

1 (Trial resumed)

2 THE COURT: Good morning, everyone. We're continuing
3 with -- I don't know if I call it a direct examination. I
4 guess technically it's a cross-examination.

5 MS. PECTOR: Redirect.

6 THE COURT: Redirect examination of the witness.
7 Ms. Pector, you may proceed.

8 GARY LANCASTER, resumed.

9 REDIRECT EXAMINATION (Continued)

10 BY MS. PECTOR:

11 Q. Mr. Lancaster, yesterday when we left the record we were
12 talking about the September 1, 2016 letter that you received
13 from Mr. Dahan. Do you remember talking about that with me?

14 A. I do.

15 Q. Mr. Lancaster, did you prepare a response to that letter?

16 A. I did.

17 THE COURT: Could you pull the mic closer.

18 MS. PECTOR: James, please pull up DX 408.

19 Q. Mr. Lancaster, what we're looking at on the screen is a
20 September 23, 2016 e-mail from you to Mr. Dahan with a copy to
21 Dan Alper and Gil Melman, and the subject is "Response to
22 Letter on Behalf of Former Major Energy shareholders."

23 Do you see that?

24 A. I do.

25 Q. "Dear Mr. Dahan, this letter is written to you in response

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Lancaster - redirect

1 to your letter dated September 2, 2016, which was written on
2 behalf of the former shareholders of Major Energy who are
3 represented by sellers' representative Saul Horowitz."

4 Is that the letter that you were referring to?

5 A. Yes, it is.

6 Q. James, if we could go to the next page. If you will just
7 pan through so Mr. Lancaster can see it.

8 Mr. Lancaster, was this letter responding to the
9 substance of Mr. Dahan's letter?

10 A. Yes, it was.

11 Q. And did this letter respond to Mr. Horowitz's assertions at
12 that time?

13 A. It did.

14 MS. PECTOR: Your Honor, we're not going to go into
15 the content of this letter, but we will tender into evidence in
16 the event the Court is interested in it. From a timing
17 perspective, we are just going to move to introduce into
18 evidence all the exhibits.

19 THE COURT: Remind me this last one, the number.

20 MS. PECTOR: DX 408. The date of it is September 23,
21 2016.

22 And I'm happy to take him through the letter. We just
23 wanted to streamline our time.

24 THE COURT: That's great. You want to move all the
25 exhibits?

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Lancaster - redirect

1 MS. PECTOR: Yes, your Honor, so just for the record,
2 if I could call them out.

3 THE COURT: Yes.

4 MS. PECTOR: DX 1, DX 272.

5 THE COURT: Hold on.

6 MS. PECTOR: DX 298.

7 THE COURT: These are in a different order; you did
8 them in numerical order.

9 MS. PECTOR: Yes, your Honor.

10 THE COURT: OK.

11 MS. PECTOR: DX 390, DX 503, DX 516, DX 518, DX 698,
12 DX 962, DX 1033.

13 THE COURT: OK.

14 MS. PECTOR: DX 408, which is the one we just
15 introduced.

16 THE COURT: Yes.

17 MS. PECTOR: Then we had PX 161 and PX 524.

18 THE COURT: OK.

19 MS. PECTOR: Then, your Honor, on several of these
20 exhibits we had spreadsheets, and the spreadsheets have the
21 letter native file attached that we use. Like for 1033, for
22 example, we use 1033A. Do you need us to identify for the
23 Court all the ones that have an A?

24 THE COURT: I don't think so, unless the parties feel
25 otherwise, but I think if you have admitted 1033, I assume that

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Lancaster - redirect

1 unless I ruled otherwise that 1033A is admitted.

2 MS. PECTOR: Perfect, yes.

3 Your Honor, we pass the witness.

4 I'm sorry, I apologize, there was one other
5 housekeeping matter my colleague informed me of. We would like
6 to introduce the two demonstratives -- or mark the two
7 demonstratives for the record as evidence. The first is the
8 PowerPoint that we provided to the Court. We had tendered that
9 to the other side and worked through any objections before we
10 used it in court, so we would like to mark that.

11 THE COURT: Mark it as a demonstrative.

12 MS. PECTOR: Yes, your Honor. And then we would also
13 like, if it's OK with the Court, for our trial tech to take a
14 picture of this write-up and just mark it for the court record
15 to show that it was a demonstrative that was created while in
16 court.

17 THE COURT: OK, that's fine.

18 Any objection to that?

19 MR. MAROONEY: No objection to marking it as a
20 demonstrative.

21 THE COURT: OK.

22 MR. BROWN: Your Honor, just for housekeeping so going
23 forward, would it help your Honor if we just mark this as
24 Defendant's Demonstrative 1, Defendant's Demonstrative 2 and
25 then we will track it that way?

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Lancaster - recross

1 THE COURT: That's fine. So, we have Demonstrative 1,
2 which is the PowerPoint.

3 MS. PECTOR: This would be Demonstrative 2.

4 MR. BROWN: We will take a picture, submit it to
5 Bruce.

6 THE COURT: That's fine.

7 (Defendant's Exhibits DX 1, DX 272, DX 298, DX 390, DX
8 503, DX 516 received in evidence)

9 (Defendant's Exhibits DX 518, DX 698, DX 962, DX 1033,
10 DX 408 received in evidence)

11 (Plaintiff's Exhibits PX 161 and PX 524 received in
12 evidence)

13 MS. PECTOR: With that, your Honor, we tender the
14 witness.

15 THE COURT: Thank you.

16 Mr. Marooney.

17 RECROSS EXAMINATION

18 BY MR. MAROONEY:

19 Q. Counsel asked you a few questions about PX 473, and I'd
20 like to pull that exhibit up, please.

21 Now, to reorient us, the bottom part of this exhibit
22 is the June 27, 2016 e-mail from you to Mr. Alper. Do you see
23 that, sir?

24 A. I do.

25 Q. And then the top part is an e-mail from Mr. Horowitz back

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Lancaster - recross

1 to Mr. Melman. Do you see that, sir?

2 A. I do.

3 Q. And Mr. Horowitz's e-mail again is in the context of
4 addressing what the earnout payment should be for 2016, right?

5 A. Yes, I understand that.

6 Q. All right. And when Mr. Horowitz sends this e-mail to
7 Mr. Melman and you he writes in the first sentence "This is
8 Exhibit B of the executed earnout agreement. Please use the
9 attached template for our discussions tomorrow." Do you see
10 that, sir?

11 A. I see that language.

12 Q. Now, let's go to 473A. We see at the bottom there are two
13 tabs, and the first tab is labeled "NGE Major Earnout and Cash
14 Installment." Do you see that, sir?

15 A. I do.

16 Q. That's the tab that does not have your green boxes,
17 correct?

18 A. That is correct.

19 Q. We can put that aside. Counsel asked you a few questions
20 yesterday about PX 105.

21 Pull that up, please.

22 This is the e-mail from Mr. Hennekes to Mr. Wiederman
23 and you. Now, you obviously did not author this e-mail,
24 correct.

25 A. That's correct.

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Lancaster - recross

1 Q. Mr. Hennekes did, right?

2 A. Yes, he authored it.

3 Q. And if we look down at the four bullet points in
4 Mr. Hennekes' e-mail, the second bullet point is addressing the
5 \$15 million in cash installment payments, correct?

6 A. So, the second bullet point actually combines the cash
7 installments, and it also has language that applies to the
8 earnout but not to the cash installments.

9 Q. Well, the third bullet point says "Earnout of up to \$20
10 million max (5.5, 7.3, 7.3 million is attached)." Do you see
11 that, sir?

12 A. I see it.

13 Q. And the second bullet point above it says up to \$15 million
14 cash installments of five million each payable over three years
15 subject to achieving EBITDA profits in your plan. Do you see
16 that, sir?

17 A. I do read that, that's correctly recited.

18 Q. And then counsel directed your attention to the last
19 sentence of the second bullet point, which reads "For the
20 adjusted EBITDA target for 2016 we are using the entire 2016
21 plan year for purposes of calculating whether the adjusted
22 target is met, however, for distribution purposes we would be
23 using only the actual adjusted EBITDA for April through
24 December." Do you see that, sir?

25 A. I do see that sentence.

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Lancaster - recross

1 Q. And that sentence is in the second bullet point regarding
2 the \$15 million cash installments, correct?

3 A. It is correct.

4 Q. All right. And if we go over now --

5 A. Can I finish -- excuse me, counsel. May I finish my
6 answer? Yes, you read that correctly, that is the language.
7 And what I've said before is that particular language you've
8 highlighted in the second bullet point belongs in the third
9 bullet point because it applies to the earnout; it does not
10 apply to the cash installment.

11 Q. Even though you didn't author the e-mail, right?

12 A. I did not author the e-mail. I'm just looking at it; it's
13 erroneous, it belongs in the third bullet point.

14 Q. Let's go to PX105A. Now, 105A is the spreadsheet annexed
15 to an e-mail we just looked at, and if we go down to the gray
16 boxes you see the Mark's analysis within the gray box. Do you
17 see that?

18 A. I do.

19 Q. And if we see down toward the bottom, in Row 70 through 82,
20 that's the piece that talks about the cash installment
21 component of the contingent fees, correct?

22 A. Counsel, can you direct me to which rows and columns?

23 Q. Sure. Well, there is a big boldfaced word that says
24 "installments" in row 71. Do you see that?

25 A. Yes, I do.

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Lancaster - recross

1 Q. And underneath that heading we see the cash installment
2 component of the contingent payments, do we not?

3 A. I do.

4 Q. And if we go down to the right side, when we see a
5 description of the installments, that reads "The rationale for
6 this is that Major SHs are sharing in every dollar from \$1 to
7 \$20 million, and this dollar-for-dollar deduct balances the
8 risk between us in a downside scenario. Asterisk, subject to a
9 proportionate reduction for 2016." Do you see that, sir?

10 A. Yes, I do see that.

11 Q. And that's exactly what Mr. Hennekes just was talking about
12 in his e-mail.

13 MS. PECTOR: Objection, mischaracterizes the evidence.

14 THE COURT: Sustained.

15 You can testify to your understanding.

16 A. So I see the asterisk, but let me break that into two
17 parts. So you highlighted the rows in column L that are 72
18 through 77, so this is Mark's analysis; and the box above the
19 asterisked phrase, I agree that is correct in that it does
20 apply to the cash installments. I just testified the language
21 that Mr. Hennekes has put in the second bullet point belongs
22 properly to the earnout; it did not belong to the cash
23 installments. So, if I look at that asterisked phrase here, it
24 modified the cash installment portion.

25 THE COURT: Go ahead.

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Lancaster - recross

1 Q. Can we pull up PX 634, this is the earnout agreement.

2 Eric I'm going to test you because I would like to go
3 to Exhibit B, but I don't have the page number in my notes.

4 THE COURT: Is your screen working? I think I turned
5 everything off. We got it.

6 Did your screen come back?

7 MR. MAROONEY: Yes.

8 THE COURT: OK, go ahead. Sorry about that.

9 Q. All right. We may have lost the thread here, but you're
10 looking at Exhibit B of the earnout agreement. Do you see
11 that, sir?

12 A. I do see that.

13 Q. And do you see the notes on the right side?

14 A. I do see the note. And I would point out that the phrase,
15 the asterisk, does not appear in the last line in the southeast
16 corner, so in this particular case that language in Exhibit B
17 without the asterisk indicates there is a proportionate
18 reduction for cash installments which is the same achievement
19 ratio we talked about yesterday that is the actual adjusted
20 EBITDA divided by the plan EBITDA. So it is in your client's,
21 frankly, there is no three quarters adjustment. The only
22 proportionate adjustment is the achievement ratio. And this
23 particular omission of the last line on that far right third of
24 the document in this far southeast corner now makes that read
25 properly.

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1 THE COURT: Are you saying for the cash installments
2 the achievement ratio was calculated differently than for the
3 earnout?

4 THE WITNESS: No, the achievement ratio is the same
5 achievement ratio where you take the numerator as the actual
6 adjusted EBITDA divided by the denominator which is the plan
7 adjusted EBITDA. So that's the proportional reduction piece
8 that applies to both the earnout and to the cash installments.

9 THE COURT: What about for 2016?

10 THE WITNESS: So the 2016, three quarters only applies
11 to the earnout; that's in section 2.2(b).

12 THE COURT: OK, that's only the earnout.

13 THE WITNESS: Only in the earnouts.

14 THE COURT: So for the cash for 2016 it's 12 months
15 over 12 months.

16 THE WITNESS: That's correct, for the cash
17 installments. And that again is to the benefit of Major.
18 We're not considering the three quarters. They got the entire
19 \$5 million -- no forfeiture for reduction -- for the nine
20 months versus that, and they only had that achievement ratio
21 that applies both to the earnout, and they have a
22 dollar-for-dollar below \$20 million.

23 THE COURT: Both of them use the \$20 million as the
24 plan for 2016.

25 THE WITNESS: The plan for 2016 is exactly

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1 \$20,749,213. So the denominator never changes; it's always the
2 plan.

3 MR. MAROONEY: We can put that away.

4 Q. Yesterday you I think testified that to hit the earnout
5 max -- assuming the customer count was at the customer count
6 number -- that Major Energy would have to earn something in the
7 range of \$28 million. Do you remember that, sir?

8 A. So to be precise, if you look at that Demonstrative Exhibit
9 2 from the defendants, I used the example yesterday if you took
10 the first quarter and added exactly \$20 million you would get
11 exactly the \$5,454,545 number.

12 Q. Right, we added 20 million to the over \$7 million that was
13 earned in the first quarter to get to that number.

14 A. Right. In other words, if you say assuming all targets
15 hit, you took into consideration that you satisfied 2.2(b), you
16 satisfied 2.2(c), and you took into consideration 2.2(d),
17 meaning there was no customer count reduction.

18 Q. And you testified yesterday to the effect that the first
19 quarter in the energy business -- unless it's a polar vortex --
20 is a very profitable quarter but the second and third quarters
21 not so much. Do you remember that?

22 A. That's a typical year in-year out assumption in energy.

23 Q. Why is that?

24 A. Because winter months tend to be better margin months, and
25 the only exception would be typically with that polar vortex

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Lancaster - recross

1 where you have variable rate customers and you were not able to
2 fully calculate the supply necessary for those customers, you
3 would have to go buy supplies in a next day or spot market.

4 Q. So in your view to hit the earnout Major would have to go
5 gang busters in the very two quarters that are typically not
6 the most profitable quarters, right?

7 A. Well, I think you would have to consider all three
8 quarters. So the last quarter of the year also has winter
9 months, and every year is different, so the last quarter of the
10 year is also a pretty robust quarter; it could be fairly
11 comparable. And then the third quarter would typically be
12 weak. The second quarter, depending on the summer, if you're
13 in the Northeast states and you have an extremely hot summer,
14 those could be a little more profitable. So those are
15 extrapolations made from years of experience in the energy
16 industry.

17 Q. So you were hoping for a really really cold October,
18 November, December of 2016.

19 A. Well, if we're taking a scenario that would give you the
20 \$20 million, I would say you would have to have a pretty cold
21 winter and a hot summer.

22 Q. OK. By the way, when NGE bought -- when the MIPA and
23 earnout were signed on March 18, 2016, the first quarter wasn't
24 even over, right?

25 A. That's correct.

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Lancaster - recross

1 Q. All right. You testified yesterday about a low income
2 order. Do you remember that?

3 A. I do.

4 Q. And, first, you know that the low income order -- I think
5 you testified yesterday it wasn't even passed until July 2016.

6 A. That's correct, in July.

7 Q. And that it actually didn't even come into effect until
8 sometime later in 2017. Are you aware of that, sir?

9 A. I am aware of that.

10 Q. All right. And I think you may have testified to the
11 effect that the low income order had some kind of -- strike
12 that.

13 Let's just pull up PX 196.

14 So Plaintiff's Exhibit 196 is an e-mail from Mr.
15 Alper. You know who he is, right, sir?

16 A. I do. He's the CEO of Major.

17 Q. And that's to Mr. Wiederman on top. But looking at the --

18 I'm sorry, Eric, I'm confusing you. Let's go to Mr.
19 Alper's e-mail below.

20 This is an e-mail from Mr. Alper to Mr. Kroeker and
21 Mr. Maxwell. Do you see that, sir?

22 A. I do see that.

23 Q. And you are not on this e-mail.

24 A. That's correct, I have not seen it before today.

25 Q. And he is attaching a weekly report for Major Energy. Do

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Lancaster - recross

1 you see that?

2 A. I do.

3 Q. OK. And you were not included in these weekly reports that
4 were provided by Mr. Alper, were you?

5 A. I was included in those reports or reviewed them every week
6 while National Gas & Electric was the owner of Major. After
7 Spark's dropdown, I did not review those reports any further.

8 Q. So this one, the date of this e-mail is September 16, 2016,
9 which is after the dropdown.

10 A. That's correct.

11 Q. So you did not view this one, did you?

12 A. I did not.

13 Q. Let's go to page 6. If we could look at box 6, Mr. Alper
14 is providing a regulatory update as developments occur,
15 especially in New York and Pennsylvania. Do you see that, sir?

16 A. I do see that.

17 Q. And the update is "We have compiled an analysis of New York
18 low income order, and I have shared with Spark. The data
19 provided by the utilities of customers needed to be dropped are
20 showing a small impact on Major's New York book especially
21 through the 2018 calendar year. Supply estimates that the
22 total margin effect will be less than \$1 million."

23 Did I read that correctly?

24 A. You did.

25 Q. And have you reviewed or got to see Mr. Kroeker's own

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Lancaster - recross

1 statements about the impact of the low impact order on the
2 regulatory environment that he made on earnings calls?

3 A. I have not reviewed those.

4 MR. MAROONEY: No further questions.

5 THE COURT: Anything further?

6 MS. PECTOR: No redirect, your Honor.

7 THE COURT: Thank you, sir. You may step down.

8 MR. MAROONEY: Oh, as a housekeeping can we offer PX
9 196?

10 THE COURT: Yes, PX 196 is received.

11 (Plaintiff's Exhibit PX 196 received in evidence)

12 THE COURT: Plaintiff may call your next witness.

13 MR. DAHAN: Plaintiff calls Nathan Kroeker.

14 THE COURT: All right.

15 NATHAN KROEKER,

16 called as a witness by the plaintiff,

17 having been duly sworn, testified as follows:

18 THE COURT: The witness has been sworn. Mr. Dahan,
19 you will start with the document witness's direct?

20 MR. DAHAN: If we could do like we did yesterday, we
21 would like to introduce -- hand up plaintiff's objections to
22 the witness.

23 THE COURT: All right, thank you.

24 Do you have a paper copy of the witness's statement
25 too? Or is it in one of the binders? Thank you.

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Kroeker - cross

1 MR. DAHAN: We do.

2 DIRECT EXAMINATION

3 BY MR. DAHAN:

4 Q. Good morning, Mr. Kroeker.

5 A. Good morning.

6 Q. In front of you I think is your written direct statement.

7 Do you see that?

8 A. Yes.

9 Q. And if you could turn to the last page, it's page 867, is
10 that your signature?

11 A. Yes.

12 Q. Dated December 23, 2019?

13 A. Yes.

14 Q. And do you adopt the statements made in this statement?

15 A. Yes.

16 MR. DAHAN: Your Honor, we would like to submit it and
17 proceed.

18 THE COURT: I'm receiving the written direct statement
19 as the direct testimony of Mr. Kroeker, subject to the
20 objections which I am reserving and will rule on at the time I
21 issue my findings and conclusions. And you may proceed with
22 cross.

23 CROSS EXAMINATION

24 BY MR. DAHAN:

25 Q. Mr. Kroeker, you currently serve as the president and CEO

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Kroeker - cross

1 of defendant's Spark Energy, Inc., correct?

2 A. Yes.

3 Q. For purposes of my examination I will refer to Spark
4 Energy, Inc. as Spark, OK?

5 A. OK.

6 Q. You have been the CEO of Spark since April 2014, correct?

7 A. Yes.

8 Q. So you served in this position throughout the entire
9 earnout period; isn't that correct?

10 A. Yes.

11 Q. Now, Spark is headquartered in Houston, Texas; is that
12 correct?

13 A. Yes.

14 Q. And as CEO of Spark you oversee the day-to-day operations
15 of the company, correct?

16 A. Yes.

17 Q. You also helped shaped overall strategy of the company,
18 correct?

19 A. Yes.

20 Q. You report to the board of Spark; isn't that correct?

21 A. That's correct.

22 Q. And you are one of the board members of Spark, correct?

23 A. That is correct.

24 Q. And you have been a board member since August 2014,
25 correct?

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Kroeker - cross

1 A. Correct.

2 Q. Now, Mr. Maxwell, Keith Maxwell, is the nonexecutive
3 chairman of the Spark board; is that correct?

4 A. That's correct.

5 Q. Now, as CEO of Spark you review and sign Spark's form 10Ks,
6 is that correct?

7 A. Yes.

8 Q. The annual reports?

9 A. Yes.

10 Q. And with Spark's public filings with the SEC Spark
11 endeavors to be as truthful and accurate as possible; is that
12 right?

13 A. Yes.

14 Q. And as CEO of Spark you also participate on company
15 earnings calls, correct?

16 A. Yes.

17 Q. And on these earnings calls you make statements about
18 Spark's financial conditions and operations at the time,
19 correct?

20 A. Yes.

21 Q. And at times you will also answer questions from analysts?

22 A. Correct.

23 Q. And on earnings calls you endeavor to be as truthful and
24 accurate as possible, right?

25 A. Yes. And keep in mind I'm tailoring my comments on the

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Kroeker - cross

1 earnings calls to the audience which are public investors.

2 Q. Right, but you want to be truthful, right?

3 A. Absolutely. Absolutely.

4 Q. Now, Spark is the parent of Spark HoldCo LLC, right?

5 A. Yes.

6 Q. And Spark HoldCo was formed as a Delaware LLC around April
7 of 2014; is that correct?

8 A. I believe that's correct.

9 Q. Let's show Plaintiff's Exhibit 251.

10 Have you seen this document before?

11 A. I don't recall specifically.

12 Q. All right. So this is the second amended and restated
13 limited liability company agreement of Spark HoldCo LLC dated
14 as of August 1, 2014. Do you see that?

15 A. I do see that.

16 Q. OK. Let's go to PX 251, the same exhibit but page 35. Is
17 that your signature on that page?

18 A. Yes, that's an electronic signature.

19 Q. OK. And you're signing there on as president and chief
20 executive officer of Spark HoldCo LLC?

21 A. That's correct.

22 Q. And if we go to the next page, did you sign as the
23 president and chief executive officer of Spark Energy, Inc.?
24 Correct?

25 A. Yes.

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Kroeker - cross

1 Q. And it's identified as the managing member of HoldCo LLC,
2 correct?

3 A. Yes.

4 Q. Now, if we could go to --

5 Now, Spark is in fact the sole managing member of
6 Spark HoldCo; is that correct?

7 A. I believe that's correct.

8 Q. OK. If we could go to page 23. And if we could blow up
9 section 6.1, please.

10 Now, as the managing member, Spark has full and
11 complete charge of all affairs of Spark HoldCo; is that
12 correct?

13 A. That is my understanding, yes.

14 Q. And as the managing member, Spark has exclusive charge of
15 the management and control of Spark HoldCo's business
16 activities and operations; is that correct?

17 A. Again, that's my understanding, yes.

18 Q. And as the managing member, Spark makes all decisions
19 regarding the business activities and operations of Spark
20 HoldCo in its sole discretion without the consent of any other
21 member; isn't that correct?

22 A. I mean are you just -- are you reading this? Should I be
23 following along?

24 Q. I'm right now it would be number (ii).

25 A. OK, I agree you read that correctly.

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Kroeker - cross

1 Q. Any reason to doubt that that's accurate?

2 A. No.

3 Q. And you are the CEO of Spark HoldCo, correct?

4 A. Yes.

5 Q. And as we see in item 3, members other than the managing
6 member -- in other words, members other than Spark -- are not
7 permitted to participate in the control, management, direction
8 or operation of the activities and affairs of the company and
9 shall have no power to act for or bind the company; isn't that
10 true?

11 A. That is correct.

12 Q. Now, Spark HoldCo cannot make an acquisition without the
13 approval of Spark; is that correct?

14 A. I don't know that to be the case.

15 Q. You think Spark HoldCo can make an acquisition without the
16 approval of its managing members? Is that your testimony?

17 A. I believe so, within the delegation of authority limits
18 that are approved by the board.

19 Q. Now, as the managing member of Spark HoldCo, Spark also
20 appoints the officers and employees of Spark HoldCo; isn't that
21 true?

22 A. Can you repeat that, please.

23 Q. Sure. Why don't we go to 6.2. You see in A, "The managing
24 member may appoint, employ or otherwise contract with any
25 person for the transaction of the business of the company ..."

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Kroeker - cross

1 Do you see that?

2 A. I do see that.

3 Q. If we go to C, the managing member may appoint officers at
4 any time; is that correct?

5 A. Yes.

6 Q. And if you go down to the next sentence, "The officers will
7 serve at the pleasure of the managing member." Is that
8 correct?

9 A. Yes.

10 Q. Let's talk about National Gas & Electric, NGE, OK?

11 A. OK.

12 Q. In your witness statement, if you go to paragraph 18, you
13 state that NGE was formed in 2015 for the purpose of purchasing
14 retail energy companies and retail customer books that could
15 ultimately be resold to the Spark family. Is that correct?

16 A. Yes.

17 Q. And you cite DX 112 at 5, right?

18 A. Yes.

19 Q. Now, NGE is itself an operating ESCO; is that right?

20 A. Correct.

21 Q. Before that, the acquisition of Major Energy, NGE, was a
22 competitor of Major Energy; is that correct?

23 A. Yes.

24 Q. And NGE was also a competitor of Spark; is that correct?

25 A. Yes.

K337HOR1

Kroeker - cross

1 Q. And if NGE acquires another ESCO, it's not obligated to
2 subsequently drop down that escrow to Spark.

3 A. Not obligated, correct.

4 Q. In fact, NGE could choose to operate an ESCO it purchases
5 for as long as it wanted; isn't that true?

6 A. Yes.

7 Q. And Spark itself could even choose to reject a dropdown
8 offer from NGE; isn't that correct?

9 A. That's correct.

10 Q. Now, NGE purchased Major Energy in April 2016, right?

11 A. Yes.

12 Q. And you were not involved in the sale negotiations between
13 NGE, Major Energy and the sellers; is that correct?

14 A. I was not directly involved in the negotiations, that's
15 right.

16 Q. And in fact do you recall at your deposition you testified
17 that you didn't have any direct communications with any of the
18 sellers between November 2015 and April 15, 2016; isn't that
19 correct?

20 A. Correct.

21 Q. And just for the record, it's November 15, 2015 to April
22 15, 2016, correct?

23 A. Correct.

24 Q. And in your witness statement you discuss in some length
25 the transaction documents executed between NGE, Major Energy

K337HOR1

Kroeker - cross

1 and the sellers, correct?

2 A. Yes.

3 Q. But you did not participate in the negotiation or drafting
4 of, for example, the membership interest purchase agreement
5 between NGE, Major Energy and the sellers; is that correct?

6 A. That's correct.

7 Q. And you did not participate in the negotiation or drafting
8 of the earnout agreement, or executive earnout agreement,
9 between NGE, Major Energy and the sellers; correct?

10 A. That's correct.

11 Q. Now, you are aware that the negotiations between NGE, Major
12 Energy and the sellers began sometime in late 2015, correct?

13 A. Yes.

14 Q. And the closing of the transaction between NGE, Major
15 Energy and the sellers occurred on April 15, 2016, correct?

16 A. Yes.

17 Q. And on August 23, 2016 NGE sold Major Energy to Spark;
18 isn't that true?

19 A. Yes.

20 MR. BROWN: Objection. He is using Spark as --

21 MR. DAHAN: I think the witness understood my
22 question, but let's look at the document.

23 THE COURT: Clarify.

24 Q. So let's show PX 457, Plaintiff Exhibit 457. Have you seen
25 this before, Mr. Kroeker?

K337HOR1

Kroeker - cross

1 A. Yes.

2 Q. And this is an August 23, 2016 Spark Energy press release?

3 A. Yes.

4 Q. And the title is "Spark Energy, Inc. Announces Closing of
5 Major Energy acquisition," correct?

6 A. Correct.

7 Q. And if you look at the first sentence it says "Spark
8 Energy, Inc., a Delaware corportation, announces today that the
9 company" -- which is identified as Spark Energy, Inc. -- "has
10 completed its acquisition of the Major Energy Companies." Do
11 you see that?

12 A. I do see that.

13 Q. There is no mention of Spark HoldCo in this press release,
14 is there?

15 A. No. The public entity is Spark Energy, Inc. so anytime we
16 are speaking to investors we do it through Spark Energy, Inc.

17 Q. Again, but to my question, do you see Spark HoldCo on this
18 press release?

19 A. No.

20 Q. So just four months into the 33 month earnout period NGE
21 has already sold its ownership interest in Major Energy,
22 correct?

23 A. Yes.

24 Q. Now this transaction is referred to in this case as the
25 dropdown transaction, correct?

K337HOR1

Kroeker - cross

1 A. Yes.

2 Q. If we could show Plaintiff's Exhibit 756.

3 Have you seen this filing before, or schedule 14C, in
4 August of 2016?

5 A. I'm sure I have, but I don't recall the specifics of it.

6 Q. And this was filed in August 2016. That's about four
7 months after the closing of the deal between NGE and the
8 sellers, correct?

9 A. I don't see a date on here.

10 Q. OK. If we go to that cover page, do you see on the top it
11 says attached form, and it has a date received in the
12 Commission on 8/3/2016?

13 A. I see that, yes.

14 Q. Under the name Spark Energy, Inc.?

15 A. Yes.

16 Q. And you were the CEO of Spark at the time of this filing,
17 right?

18 A. Yes.

19 Q. And this filing, this 14C, was the to inform Spark
20 stockholders of Spark board's decision to approve the entry of
21 the membership interest purchase agreement between NGE, Spark,
22 Spark HoldCo and RetailCo, what has been referred to as the
23 Spark MIPA?

24 A. You would have to walk me through the pages.

25 Q. Sure. Why don't we do that. Why don't we just go to

K337HOR1

Kroeker - cross

1 the -- there.

2 Do you see that? And it starts "This information
3 statement is being circulated to the stockholders of record of
4 Spark Energy, Inc., identified as the company." Do you see
5 that?

6 A. I do see that.

7 Q. "And the purpose of this" -- the next sentence -- "The
8 purpose of this information statement is to inform our
9 stockholders of actions taken by written consent of the holders
10 of a majority of outstanding voting stock of the company." Do
11 you see that?

12 A. Yes.

13 Q. And then if you go to number 1, it talks about how on May
14 3 -- that's the membership interest purchase agreement I was
15 referring to before?

16 A. Yes.

17 Q. And in fact this Spark MIPA is attached as an annex to this
18 filing.

19 If you go to 225, Eric. Sorry, page 225 of that
20 exhibit. Sorry.

21 So this was attached to the filing as Annex A, and
22 it's a membership interest purchase agreement by and among
23 National Gas & Electric LLC, RetailCo LLC, Spark HoldCo LLC and
24 Spark Energy LLC dated as of May 3, 2016?

25 A. Yeah. I think you misstated one of the names, but, yes,

K337HOR1

Kroeker - cross

1 that's what it says.

2 Q. So just about two weeks after the closing of the
3 transaction between NGE and the sellers, the Spark board
4 already approved the entry of this Spark MIPA; is that correct?

5 A. Yes.

6 Q. Eric, again this same exhibit, if we go down to I guess
7 003 -- I'm sorry -- well, I'm sorry, the page before. I'm
8 sorry.

9 So in this filing there is a description of the
10 transaction, background of the transaction. Do you see that?

11 A. I do.

12 Q. Now if we can go to the next page which is part of this
13 section. And in the second paragraph it says that "In November
14 2015, NG&E recommenced discussions with the Major Energy
15 Companies." Do you see that?

16 A. Yes.

17 Q. And it says "Both NGE and the company"-- and the company is
18 Spark Energy, Inc., isn't that correct?

19 A. Yes.

20 Q. -- "believed that the new growth initiatives at the Major
21 Energy Companies have significantly increased the long-term
22 value of the Major Energy Companies."

23 Did I read that correctly?

24 A. You read that correctly.

25 Q. And that was a true statement in this filing, wasn't it?

K337HOR1

Kroeker - cross

1 A. Yes, as of May of 2016 what I had in front of me was the
2 projections that were incorporated into the NG&E and Major
3 MIPA. Based on those projections, this is an accurate
4 statement.

5 Q. This says that in November 2015 both NGE and the company
6 believed what it says in this sentence.

7 MR. BROWN: Objection. Mischaracterization. It's the
8 second sentence.

9 A. Yeah, I think those are two separate sentences.

10 THE COURT: You can clarify.

11 Q. So it's your testimony that this statement is as of August
12 2016?

13 A. I believe this statement is as of the date this document
14 was filed. I believe that the discussions were recommenced in
15 November of '15.

16 Q. OK. So therefore this belief is even as of August 2016?
17 That's your testimony?

18 MR. BROWN: Objection. Mischaracterization. The
19 document is dated.

20 THE COURT: What's the date of the document?

21 MR. DAHAN: August 2016.

22 MR. BROWN: August 3, 2016.

23 MR. DAHAN: August 3, 2016, sorry.

24 Q. It says in the next sentence, "it was further the belief of
25 both the company and NG&E that the acquisition of the Major

K337HOR1

Kroeker - cross

1 Energy Companies by the company would add significantly
2 long-term value to the company's equity investors."

3 Did I read that correctly?

4 A. You read that correctly.

5 Q. And that was a true statement again as of the date of this
6 filing, correct?

7 A. Yes.

8 Q. It then says, "However, as the company did not have
9 sufficient cash on hand or availability under its credit
10 facility to close on an acquisition of the size anticipated for
11 the Major Energy Companies at that time, both the company and
12 NGE reached the conclusion that it would be in the best
13 interest of the company and its equity investors for NGE to
14 acquire the Major Energy Companies and then sell the Major
15 Energy Companies to the company at a later date." Do you see
16 that?

17 A. I see that.

18 Q. And that was a true statement at the time too, right?

19 A. Yes.

20 Q. Now, if we expand this page, Eric, if you go to the fourth
21 paragraph starting on March 21, 2016.

22 Do you see that?

23 A. Yes.

24 Q. It says, "On March 21, 2016, Mr. Maxwell met with the
25 company's chief executive officer, Nathan Kroeker, to formally

K337HOR1

Kroeker - cross

1 discuss the purchase from NG&E and dropdown of the Major Energy
2 Companies to the company."

3 Do you see that?

4 A. Yes.

5 Q. And that was a true statement, correct?

6 A. Yes.

7 Q. And it says that the meeting was to formally discuss the
8 dropdown of Major Energy to the company. And again the company
9 in this filing is identified as Spark Energy, Inc. Isn't that
10 true?

11 A. Yes.

12 Q. And this meeting is three days after the MIPA was executed
13 between NGE and the sellers; isn't that true?

14 A. I don't recall that date, but it sounds reasonable to me.

15 Q. In the last sentence of this paragraph it says, "Following
16 the conclusion of due diligence and analysis by the company,
17 Mr. Kroeker recommended to the board that the company should
18 acquire the Major Energy Companies from NG&E on the terms
19 described above."

20 Do you see that?

21 A. I see that.

22 Q. And that was a true statement, correct?

23 A. Yes. Yes.

24 Can we go back to the definition of company for a
25 minute?

K337HOR1

Kroeker - cross

1 Q. Sure.

2 A. Because there seems to be a lot of focus on that word.

3 Q. If we can go to the first page of this document.

4 "So, Spark Energy, Inc., a Delaware corporation..."

5 And then it says "References in this statement to the company
6 and Spark are Spark Energy, Inc." Do you see that?

7 A. I do. Because there's a lot of times we define Spark
8 Energy, Inc. and its affiliates as the company in our public
9 filings.

10 Q. But not in this one, correct?

11 A. That's why I wanted to come back to this. Correct.

12 Q. We go on the same page that we were looking at, the next
13 paragraph talks about on April 6, 2016. Do you see that? It
14 says that the Spark board on that day by unanimous written
15 consent created a special committee to evaluate and negotiate
16 the terms of a potential dropdown transaction. Do you see
17 that?

18 MR. BROWN: Objection. Mischaracterization.

19 MR. DAHAN: I am paraphrasing. I could read the whole
20 thing.

21 THE COURT: That's fine.

22 MR. BROWN: Withdrawn.

23 A. Yes.

24 Q. And that was a true statement, correct?

25 A. Yes.

K337HOR1

Kroeker - cross

1 Q. If we could go to Plaintiff's Exhibit 655. Have you seen
2 this document before, Mr. Kroeker?

3 A. Yes.

4 Q. And this is the unanimous written consent of the board of
5 directors of Spark Energy, Inc. to create, authorize and
6 delegate certain duties to a special committee?

7 A. Correct.

8 Q. And it's dated April 6, 2016?

9 A. Yes.

10 Q. And if we go to the last page, I think it's pdf page 6,
11 there are electronic signatures there?

12 A. Yes.

13 Q. And one of them is for you?

14 A. Yes.

15 Q. One of them is for Keith Maxwell?

16 A. Yes.

17 Q. And the others are the other members of the Spark board at
18 the time?

19 A. Yes.

20 Q. Eric, if we could go back to that description of the
21 transaction section.

22 THE COURT: Are you back on 756 now?

23 MR. DAHAN: Yes.

24 Q. So, on page 6 there is additional description of different
25 events and actions on April 6, 2016, and then April 11, 2016.

K337HOR1

Kroeker - cross

1 Eric, if you could go to the next page.

2 And then April 11, 2016; April 19, 2016; April 21,
3 2016; April 22, 2016; April 24, 2016; April 25, 2016. Do you
4 see all that?

5 A. Yes.

6 Q. Without having to go through each one, any reason to
7 believe any of the statements of those dates would be
8 inaccurate in this filing?

9 A. No.

10 Q. Now, you are aware that prior to the closing of the
11 transaction between NGE and the sellers on April 15, 2016, NGE
12 had already sent several offer letters to Spark about this
13 dropdown, correct?

14 A. Yes.

15 Q. One on April 7; do you recall that?

16 A. Yes.

17 Q. One on April 8?

18 A. Yes.

19 Q. And one on April 15, correct?

20 A. I believe so.

21 Q. And to your knowledge were any of those offer letters
22 shared with the sellers prior to closing?

23 A. Not to my knowledge. I'm sorry, the sellers, you mean the
24 sellers of Major Energy.

25 Q. That's correct.

K337HOR1

Kroeker - cross

1 A. Not to my knowledge.

2 Q. And you definitely didn't share it with them, correct?

3 A. I did not.

4 Q. Now, you have seen the MIPA that was entered into between
5 NGE, Major Energy and the sellers, correct?

6 A. Yes.

7 Q. You weren't involved in the drafting or negotiations, but
8 you have seen it, correct?

9 A. That's correct.

10 Q. Why don't we look at Defendant's Exhibit 2.

11 THE COURT: Did you say Defendant's 2?

12 MR. DAHAN: Yes.

13 Q. That is the MIPA dated March 18, 2016. Do you see that?

14 A. Yes.

15 Q. Does that also now refresh your memory about how many days
16 from this to that meeting we saw on March 21 with you and
17 Mr. Maxwell that we talked about in the 14C?

18 A. Yes, it does.

19 Q. And if I could draw your attention to page 6 of this
20 document, Spark is not a buyer in this agreement, is it?

21 A. No, it's not.

22 Q. Spark Holdco is not a buyer to this agreement, is it?

23 A. No.

24 Q. In fact, is Spark even mentioned in this agreement?

25 A. No.

K337HOR1

Kroeker - cross

1 Q. Is Spark Holdco mentioned in this agreement?

2 A. No.

3 (Continued on next page)

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K33AHOR2ps

Kroeker - Cross

1 Q. Turn to article 6 of this agreement. That's page 40, I
2 believe?

3 THE COURT: Counsel, can I clarify? It's not
4 mentioned on this page.

5 Q. It's your understanding that Spark is mentioned somewhere
6 in this agreement?

7 A. I don't know.

8 Q. Now, in connection with the dropdown, NGE and Spark, and
9 Spark HoldCo entered into what's been referred to as the Spark
10 MIPA, correct?

11 A. Yes.

12 Q. In that agreement, the parties made representations and
13 warranties, correct?

14 A. Yes.

15 Q. And so in this MIPA there were representations and
16 warranties of the buyer. You see that?

17 A. Yes.

18 Q. And that was NGE, correct?

19 A. Yes.

20 Q. And if we go to the next page, one of those representations
21 was, "Buyer NGE is acquiring the interest, which is the Major
22 Energy membership interest, solely for its own account for
23 investment purposes and not with a view to, or for offer or
24 sale in connection with, any distribution thereof." You see
25 that?

K33AHOR2ps

Kroeker - Cross

1 A. I do see that.

2 Q. Do you see anything in this provision that says if NGE is
3 acquiring Major Energy, it would then sell it to Spark at a
4 later date?

5 A. I don't see that in here. But that was generally
6 understood between the parties dating back to 2015.

7 Q. But it wasn't put in this agreement, correct?

8 A. I don't see it in this agreement.

9 Q. And in fact NGE was an initial drafter of this agreement;
10 isn't that true?

11 A. I was not involved in that. I believe Mr. Lancaster
12 testified related to that yesterday.

13 Q. And it doesn't say in this provision that NGE is buying
14 Major Energy with a view to do a back-to-back transaction with
15 Spark, does it?

16 A. It does not say that.

17 Q. Now, in your witness statement, in paragraphs 98 through
18 100, we can focus first on 98.

19 A. OK.

20 Q. I'm just paraphrasing. Correct me if I'm misstating your
21 testimony. You say that part of Spark's dropdown due diligence
22 efforts are to develop certain projection in Major Energy's
23 financials. Correct?

24 A. Yes.

25 Q. And you talk in your witness statement about projections

K33AHOR2ps

Kroeker - Cross

1 done in late April 2016, correct?

2 A. Yes.

3 Q. Let's look at that projection. That would be Defendant's
4 Exhibit 1028.

5 THE COURT: 1028?

6 Q. So before we get to the projection, there was a cover
7 e-mail from Andrea Gregory to you, April 22, 2016. Do you see
8 that?

9 A. I do.

10 Q. And she says --

11 A. He. Andrei.

12 Q. He said -- I apologize -- says "requested documents as of
13 this morning," and identifies the due diligence overview deck
14 and sign-off memos. Do you see that?

15 A. Yes.

16 Q. Do you remember getting those?

17 A. Yes.

18 Q. And these were documents relating to a contemplated
19 dropdown at the time, correct?

20 A. Yes.

21 Q. So let's look at the due diligence overview deck, which is
22 1028A.

23 This is a Spark Energy, Major Energy due diligence
24 overview. Do you see that?

25 A. Yes.

K33AHOR2ps

Kroeker - Cross

1 Q. And on the bottom left it says April 25, 2016, correct?

2 A. Yes.

3 Q. Do you have any idea why it's dated April 25th, it's being
4 sent to you on April 22nd?

5 A. I believe we would have had some meeting on the calendar
6 for the 25th and this would have been a draft, prepared in
7 anticipation of an April 25th meeting.

8 Q. OK. Thank you.

9 Now, to your knowledge, this due diligence deck was
10 not shared with the sellers at this time, was it?

11 A. I don't believe so.

12 Q. Let's go to the fourth page of the presentation but it's
13 slide 3. You've seen that page before?

14 A. Yes.

15 Q. And this says "Spark preliminary KFI three-year
16 projections." Do you see that?

17 A. Yes.

18 Q. And that was for Major Energy, correct?

19 A. Yes.

20 Q. And this is Spark's preliminary projections for Major
21 Energy for 2016, 2017, 2018. Do you see that?

22 A. Yes. 2016 is a partial year.

23 Q. I understand.

24 A. OK.

25 THE COURT: What's KFI?

K33AHOR2ps

Kroeker - Cross

1 THE WITNESS: Key financial indicators.

2 THE COURT: Thank you.

3 Q. And this projection, at least as of April 22, 2016,
4 correct, is after the New York resetting order in February came
5 out, right?

6 A. Yes.

7 Q. And this says Spark was projecting a three-year average
8 adjusted EBITDA of \$20,158,000. Did I read that correctly?

9 A. Yes, based on customer acquisition costs of 12 to 13
10 million dollars a year.

11 Q. OK. But that's the average, correct?

12 A. That's the average.

13 Q. And it says that associated with that, if you look to the
14 right, it says base purchase price 45 million, projected
15 earnout 29.5 million. Do you see that?

16 A. I do.

17 Q. And that's about 20 million more than the sellers
18 ultimately got in this case; isn't that true?

19 A. I believe that's correct.

20 Q. And that's after Spark's diligence; isn't that correct?

21 A. This, like I said, this was before we signed our MIPA, but
22 this was during our due diligence. This is an update that I
23 received from my financial team.

24 Keep in mind, you're looking at financial projections
25 here, not the due diligence work that we did. Right?

K33AHOR2ps

Kroeker - Cross

1 Q. I understand. But this is your document, correct?

2 A. This is our document, yes.

3 Q. Now, just to clarify, in coming up with the 20,158,000
4 number, what are you assuming at this point is going to be the
5 total adjusted EBITDA for Major Energy for the entire 2016?

6 A. I believe that's 15.7 million.

7 Q. And this is as of April 2016, correct?

8 A. Correct.

9 Q. You weren't projecting 28 million, were you?

10 A. No.

11 Q. And by the way, what was the final amount, according to
12 Spark, for 2016 for Major Energy?

13 A. 19.17.

14 Q. So about 4 million higher than this, correct?

15 A. Well, we didn't -- we didn't -- for purposes of the earnout
16 calculation, we didn't put the integration costs on the
17 sellers. That's 4.25 million. So I would say these
18 projections proved to be pretty accurate at the end of the
19 year.

20 Q. And you also didn't count the fact, for adjustments, that
21 you have pretty much zero amounts for '17, '18 when the
22 projections the sellers gave, as you know, had amounts for
23 adjustments; is that correct?

24 A. Yes, correct. But like I said, we looked at the
25 adjustments that we were aware of and put those in here, which

K33AHOR2ps

Kroeker - Cross

1 would have been 1067.

2 Q. For example, you're aware that for 2017, in the projections
3 the sellers gave NGE, you had \$1.3 million in adjustments for
4 2017. Are you aware of that?

5 A. That sounds familiar, but if we want to get into
6 adjustments, I'd like to see those documents.

7 THE COURT: But just to be clear, the 15.7 million was
8 assuming full year 2016?

9 THE WITNESS: Correct.

10 Q. And let's look at now, so for 2016, resetting order is out,
11 you're projecting full year 15.6 million. Correct?

12 A. No. You're mischaracterizing what I said, counsel. So
13 this projection is a Spark internal view, in which case we're
14 spending \$4.25 million on integration costs, which would have
15 been relevant when I'm showing this to my board, or internal
16 management, for deal approval. That would not have been
17 relevant for purposes of any earnout calculation. So you're
18 comparing apples and oranges.

19 Q. I'm not asking about earnout.

20 A. OK.

21 Q. I'm just asking a simple question.

22 A. So to Spark's shareholders, our view would have been \$15.7
23 million.

24 Q. That's right. And what was your view of how Major Energy
25 would do between '16 and '17? They would go from 15.6 to 22

K33AHOR2ps

Kroeker - Cross

1 million, 22.3 million. Isn't that true?

2 A. Yes. 3.75 plus 667, so \$4 1/2 million of that improvement
3 is strictly the integration costs and the adjustment.

4 Q. And for 2018 you're projecting 22.4 million approximately,
5 correct?

6 A. Correct?

7 Q. You weren't projecting 16 million, correct?

8 A. I was not.

9 Q. But that's what happened, right?

10 A. Well, fundamental difference, and you look at customer
11 acquisition costs. We expected that they would continue to
12 spend 12 to 13 million dollars a year acquiring customers and
13 replenishing the book.

14 The other very relevant line here is the electric
15 volumes, which you can see the volumes going from 2 terawatt
16 hours up to 2.8 terawatt hours over the three-year period.
17 This shows a business that's growing. In reality that's not
18 what happened. What happened was the business shrunk over that
19 period of time.

20 Q. Right, after Spark came in, correct?

21 MR. BROWN: Objection, Judge.

22 THE COURT: Sustained.

23 A. I don't think --

24 THE COURT: You don't have to answer.

25 Q. You also in your witness statement, if we can go back to

K33AHOR2ps

Kroeker - Cross

1 your witness statement, paragraph 101, you discuss in this
2 paragraph a Houlihan Lokey valuation done in early 2017. Do
3 you see that?

4 A. Yes.

5 Q. And you cite, in footnote 61, to a DX 541. Right?

6 A. Yes.

7 Q. Let's look at that exhibit. Have you seen that before?

8 A. Yes.

9 Q. That's the document you're referring to, correct?

10 A. Yes.

11 Q. And the purpose of this valuation by Houlihan in 2017 was
12 to determine the fair value of Major Energy under ASC 820,
13 correct?

14 A. Is ASC 820 the purchase accounting pronouncement?

15 Q. Yes. And allow me to just -- let's go to --

16 A. This document was done for the purposes of purchase
17 accounting.

18 Q. That's right. I want to go to PDF, page 5, first bullet.

19 So it says "Houlihan Lokey Financial Advisors, Inc.
20 was retained by Spark Energy Inc.," identified as Spark or the
21 acquirer, "to express our conclusions regarding the fair value
22 of certain identifiable intangible assets of Major Energy, the
23 Major Energy companies, as of April 15, 2016." Do you see
24 that?

25 A. Yes.

K33AHOR2ps

Kroeker - Cross

1 Q. And again, the identified acquirer here is Spark Energy
2 Inc., correct?

3 A. Yes.

4 Keep in mind Spark Energy Inc. is the public entity
5 that has to file the 10-K for which this -- which is why we
6 hired Houlihan.

7 Q. Now, isn't it true that, for purposes of this valuation,
8 Houlihan made certain projections for Major Energy for 2016,
9 2017, and 2018 as of April 15, 2016, correct?

10 A. Yes.

11 Q. And in doing that, it made certain projections with respect
12 to customer count as well as adjusted EBITDA for those years,
13 correct?

14 A. I believe so.

15 Q. And with respect to customer count, Houlihan actually
16 projected a higher customer count figure than projected and
17 agreed upon in the earnout agreement target, isn't that true?

18 A. You would have to show me that page.

19 Q. OK, we'll do that. Why don't we go to 214 of this
20 document, page 214.

21 So do you see there's a line that says on top
22 "expected EBITDA," and there's a line "expected customer
23 count." Do you see that?

24 A. I do see that.

25 Q. And I'll read you from your witness statement in 101.

K33AHOR2ps

Kroeker - Cross

1 A. So I have a hard time reading those numbers. Can you just
2 help me out. Across the top is 33117, 33118, 33119?

3 Q. That's correct.

4 A. And then the customer account numbers are, is it 180, 190?

5
6 Q. Yes, 180, 195, 213.

7 So for 2016, it was projecting 180,000 customers,
8 correct?

9 A. Yes.

10 Q. And you're aware from your witness statement that the
11 targets for 2016 in the earnout agreement projected only
12 178,000 customers; isn't that true?

13 A. Yes.

14 Q. In fact in your witness statement, you say, in 101, when
15 you're talking about this, you say, "In doing so, it used lower
16 projected adjustment EBITDA amounts for each target year of
17 earnout and projected lower customer counts for target years
18 2017 and 2018 than those reflected in the earnout agreement."
19 You don't say 2016, '17, and '18. Correct?

20 A. Do you want to point me to where you're reading?

21 Q. Yes. It's paragraph 101 of your witness statement, the
22 last sentence. You only identified target years '17 and '18 on
23 customer count, right?

24 A. Yes.

25 Q. And then Houlihan is obviously projecting year-over-year

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Kroeker - Cross

1 growth as higher, up to 213 customers for 2018. Do you see
2 that?

3 A. I do see that.

4 Q. And for adjusted EBITDA, it's also projecting
5 year-over-year growth; isn't that true?

6 A. I just lost my screen, so --

7 Q. I'm sorry.

8 THE COURT: You have to hold your breath and it will
9 come back.

10 A. OK. Counsel, I'm having a hard time reading the top-line
11 numbers.

12 Q. Sure. It's 18,277,000 for the first column, 21,376,000 for
13 the second column, and then 24 million something.

14 A. So 18, 21, and 24?

15 Q. That's correct.

16 A. So that would be growth, yes.

17 Q. That's correct. It was not projecting 16 million in
18 adjusted EBITDA for 2018, was it?

19 A. No. I mean, it's projecting the 12 months ended March 31st
20 of '19, but, yes, there's nothing in here that says 16 million
21 for calendar year '18.

22 MR. DAHAN: Now we can cover this up.

23 Q. Now in paragraph 102 of your witness statement, if you have
24 that in front of you, you say, "These due diligence efforts and
25 analyses further reinforced my prior belief that the earnout

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Kroeker - Cross

1 targets reflected in the earnout agreement between NGE and the
2 sellers were quite high and it would be difficult for Major
3 Energy to achieve." Do you see that?

4 A. Yes.

5 Q. I want to look at some earnings calls for Spark. OK?

6 A. OK.

7 Q. Let's look at Plaintiff's Exhibit 256. This is an earnings
8 call for the second quarter of 2016 for Spark Energy, correct?

9 A. Yes.

10 Q. And the earnings call is taking place on Thursday, August
11 11, 2016, correct?

12 A. Yes.

13 Q. That's about two weeks before the dropdown, correct?

14 A. Yes.

15 Q. And this is after Spark's due diligence and the board's
16 approval to proceed with the dropdown, correct?

17 A. Yes.

18 Q. And this is after the New York resetting order is out,
19 correct?

20 A. I believe the resetting order has been stayed or vacated at
21 this point.

22 Q. Yes. And we will get to that.

23 And you participated on this call, correct?

24 A. Yes.

25 Q. And you made presentations to the shareholders and analysts

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Kroeker - Cross

1 on this call, correct?

2 A. When you say "presentations," what do you mean?

3 There's no, there's no PowerPoint --

4 Q. An oral presentation.

5 A. Oral presentation, yes.

6 Q. And you answered questions from analysts on this call,
7 correct?

8 A. Yes.

9 Q. Let's turn to page 5 of the transcript, PDF at 5. So in
10 the fourth full paragraph, "we expect," do you see that?

11 A. Yes.

12 Q. So you are first telling them that you expect the Major
13 Energy transaction to be completed in the coming weeks. Do you
14 see that?

15 A. Yes.

16 Q. You then talk about the May 3rd purchase agreement with
17 NGE?

18 A. Yes.

19 Q. And that you've now received all the necessary regulatory
20 approval. Do you see that?

21 A. Yes.

22 Q. Let's go to the next paragraph. You say, "We intend to
23 continue to leverage Major's management team's retail energy
24 expertise and knowledge in addition to their 210,000 RCEs and
25 strong market position in the Northeast POR markets to further

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Kroeker - Cross

1 enhance the efficient and profitable business model they have
2 built." Do you see that?

3 A. I see that.

4 Q. Did I read that correctly?

5 A. You read that correctly.

6 Q. And that was a truthful statement you made on that day,
7 correct?

8 A. As of August the 11th, 2016, I believed that was a true
9 statement, yes.

10 Q. Let's go to the next earnings call. That's Plaintiff's
11 Exhibit 257. So we are now in November 2016, correct?

12 A. Yes.

13 Q. And now this is a transcript of the third quarter of 2016
14 earnings call for Spark Energy Inc., correct?

15 A. Yes.

16 Q. And this is a few months after the dropdown, correct?

17 A. Yes.

18 Q. And it's in fact even after the low-income order came out,
19 correct?

20 A. I believe so.

21 Q. And you participated on this call, correct?

22 A. Yes.

23 Q. And you made an oral presentation to shareholders and
24 analysts on this call, correct?

25 A. Yes.

K33AHOR2ps

Kroeker - Cross

1 Q. And you answered questions from analysts on this call as
2 well, correct?

3 A. Yes.

4 Q. Let's go to page 5 of the transcript. And you say the
5 following: "Turning to M&A, I would like to give you an update
6 on our two acquisitions, Provider Power and Major Energy. We
7 closed Provider on August 1, and Major was closed as a dropdown
8 from our affiliate National Gas & Electric on August 23.
9 Although we have held those two acquisitions for a short time,
10 we are very encouraged by the results we're seeing thus far,
11 both in terms of customer counts as well as profitability."

12 See that?

13 A. I do see that.

14 Q. I read that correctly?

15 A. Yes.

16 Q. And that was a true statement at that time, November 2016,
17 correct?

18 A. Yes.

19 I would like to call your attention to the fact that
20 we are lumping together Provider and Major. Provider was
21 poised to renew their entire customer portfolio in margins that
22 were going to double in size starting in January of the
23 upcoming year, and we were very, very excited about that
24 opportunity.

25 Q. And so did you say in here, but that's only with respect to

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Kroeker - Cross

1 Provider Power?

2 A. I did not say that. But I did call up Maine and Hampshire
3 in the following sentence, which is all Provider. Major wasn't
4 doing business in those markets.

5 Q. Let's go to page 7. So in the middle, you were asked a
6 question -- on top, sorry -- by Mr. Driscoll, from FBR. See
7 that?

8 A. Yes.

9 Q. And he says, "Maybe we can just talk about how Major and
10 Provider are performing." A little more specificity to your
11 expectation. Do you see that?

12 A. Yes.

13 Q. And you can compare and contrast the positives and, if at
14 all, any negatives. Do you see that?

15 A. Yes.

16 Q. And then you first talk about Provider.

17 A. Yes.

18 Q. And then -- now you do separate Major. Do you see that?

19 A. Yes.

20 Q. So let's see what you said about Major. "For Major --
21 Major again, we're seeing strong profitability, better than we
22 had anticipated. Volumes are a little bit less than what we
23 had anticipated, but I think they're very short term in nature.
24 And we're seeing increased customer acquisitions. We're seeing
25 a lot of growth in that space coming online, particularly on

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Kroeker - Cross

1 the commercial side of that business. And the unit margins are
2 very strong. And the overall profitability is better than we
3 had expected. So very pleased with those two businesses." Do
4 you see that?

5 A. I do see that.

6 Q. And did I read that correctly?

7 A. You read that correctly.

8 Q. And you were being truthful when you made those statements
9 to Mr. Driscoll, correct?

10 A. Yes. Those are very carefully chosen words that we used in
11 addressing his specific question. And I believe every bit of
12 that was true in November of 2016.

13 Q. And then you say, "One of the things that we're working on
14 early in the next year is taking over all of the supply
15 function for Major, which is a significant synergy to us and
16 will result in us adding several million dollars to the bottom
17 line when we step into that position." Do you see that?

18 A. Yes.

19 Q. And that's as of November 2016, correct?

20 A. Yes.

21 Q. That was a truthful statement, right?

22 A. Yes.

23 Q. Let's look at Spark's next earnings call. PX 316. We are
24 now into March 2017, correct?

25 A. Correct.

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Kroeker - Cross

1 Q. We're a year, about a year into the earnout, right?

2 A. Yes. Keep in mind everything I'm saying in this call may
3 be as of December 31st.

4 Q. I understand.

5 And this is a transcript of the earnings call on March
6 3, 2016 regarding Spark's fourth quarter 26 financial results,
7 correct?

8 A. It's March 3, 2017.

9 Q. I apologize. March 3, 2017, correct?

10 A. Yes.

11 Q. And you participated on this call, correct?

12 A. Yes.

13 Q. And you made an oral presentation to shareholders and
14 analysts on this call, correct?

15 A. Yes.

16 Q. And you answered questions from analysts on this call,
17 correct?

18 A. Yes.

19 Q. Let's go to page 4, the PDF page 4. And so after Mr. Davis
20 speaks, you start to talk, right? See that?

21 A. Yes.

22 Q. And you say, "Thanks, Andy. First of all, welcome to
23 Spark's fourth quarter 2016 earnings call. We had a phenomenal
24 fourth quarter and full year 2016, where we again saw Spark
25 produce record earnings." See that?

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Kroeker - Cross

1 A. Yes.

2 Q. And we could get out of that blow-up, Eric. If you go down
3 to -- sorry. Go back to the page. If you go to the last
4 paragraph, see that?

5 A. I see that.

6 MR. DAHAN: If you could get out of the blow-up.

7 Q. I'll have to come back because I'm not sure what page I'm
8 looking for here. So I apologize. We'll come back to that
9 exhibit again.

10 Now, in your witness statement, in paragraph 21, you
11 state that regulatory risk is one of the two significant risks,
12 and that's growth basis, correct?

13 A. Yes.

14 Q. And then in paragraph 25, you say -- now just
15 paraphrasing -- that the resetting order and low-income order
16 in New York are particularly significant in Major Energy's
17 failures to achieve earnout targets, right?

18 A. Yes.

19 Q. And then you say, in paragraph 29, that New York was always
20 Major Energy's largest customer base, however, that market has
21 since been dramatically affected by regulatory changes, which
22 is even more so given the latest resetting order in New York.
23 Correct?

24 A. Yes.

25 Q. Now, the New York resetting order -- I think you mentioned

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Kroeker - Cross

1 this earlier -- was vacated by the New York State Supreme Court
2 in July 2016, correct?

3 A. Yes.

4 Q. And the New York Appellate Court upheld that lower court
5 vacatur a year later in July 2017. Isn't that correct?

6 A. I believe that's correct.

7 THE WITNESS: The screen is gone.

8 MR. BROWN: I think it goes off.

9 THE WITNESS: OK.

10 Q. And the New York resetting order remained vacated in fact
11 throughout the entire earnout period. Isn't that correct?

12 A. Yes.

13 Q. So that vacatur impacted the entire earnout period; isn't
14 that correct?

15 A. The order never came into effect, but the impacts of the
16 order were definitely impacting the business during that period
17 of time. Major was making decisions based on the anticipation
18 of that order or a similar order taking effect at some point.
19 So it definitely would have had a impact on Major's business.
20 Had an impact on the entire Spark business.

21 Q. Well, let's see what you said on the earnings call about
22 that.

23 A. OK.

24 Q. Let's go back to PX 256. Right. This was the second
25 quarter of 2016 earnings call in August 11, 2016 we saw

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Kroeker - Cross

1 earlier?

2 A. Yes.

3 Q. Let's go to -- so on the bottom of page 8, you see it's
4 Mr Driscoll from FBR again?

5 A. Yes.

6 Q. And let's go to the top of 9. He asks you, "Now let's
7 shift gears. Obviously the closing of the upcoming Major
8 Energy transaction will incrementally add to some of your RCEs
9 in New York State and obviously there's been a high-profile
10 court case kind of overturning the reset order. Talk about
11 your thoughts about potential impact, the timing of the
12 resolution, and what form do you think that resolution might
13 have in New York?" Do you see that?

14 A. I do.

15 Q. "And if it were to turn negative, how you would potentially
16 mitigate that?" Do you see that?

17 A. I do.

18 Q. So in the middle of your response, you identified that, in
19 late July, the court issued an order that vacated the first
20 three clauses of that order. Do you see that?

21 A. Yes.

22 Q. You say, "We see that as a huge win both for Spark and for
23 the industry. We're very, very happy about that." You see
24 that?

25 A. Yes.

K33AHOR2ps

Kroeker - Cross

1 Q. Now, let's go to PX 257.

2 A. Keep in mind, I say I don't think the issue is dead, I
3 think the commission is going to continue to do something, but
4 we're very happy that we've got some breathing room and want to
5 be proactive about it.

6 Q. OK. And we'll look at other earnings calls throughout the
7 entire period. It will be changed over the next few years.

8 So here again we're back to that third quarter of 2016
9 call. We're now on November 10, 2016. Correct? And at this
10 point there's both the New York low-income order and the New
11 York resetting order, correct?

12 A. Yes. Remind me, the previous one we looked at was second
13 quarter?

14 Q. That's correct.

15 A. OK.

16 Q. If we go to page 8 of the transcript, towards the bottom,
17 so there is Mr. Driscoll again, from FBR. And he says,
18 "There's been a little bit of movement in the nearly
19 contentious behavior between the energy retailers and New York
20 State. Can you just update us on where the latest stance is?
21 I know there's an injunction on the low-income order. Give us
22 your expectations with the timings, potential resolution, and
23 why the impact is relatively muted on your financials." Do you
24 see that?

25 A. Yes.

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Kroeker - Cross

1 Q. He's talking about Spark financials, correct?

2 A. Yes.

3 Q. And he notes that the low-income order has been enjoined at
4 this point, correct?

5 A. Yes.

6 Q. And the response is, "Yes. I mean, we saw a big victory
7 with the resetting order a few months ago, another one on the
8 low-income injunction order." Do you see that?

9 A. Yes.

10 Q. "We're going to work very closely with the commission to
11 come up with a set of ranges that we think will be good for the
12 retailers in the market, but also good for the commission and
13 ultimately drive out the bad actors. So I don't have -- I
14 can't tell you what the timing of that is. I think it's longer
15 term. I don't think it's imminent. And I will tell you that
16 we're working very proactively with the commission in order to
17 come up with something that works well for everybody." You see
18 that?

19 A. I do.

20 Q. And did I read that correctly?

21 A. Yes. There's a tran -- you know, when they transcribed
22 this, they misstated what I said. I said "rule changes", not
23 "ranges," but you read it correctly.

24 Q. Thank you for the clarification. Let's look at PX 316.

25 So, again, we saw this before. We're at March 3rd, 2017. And

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Kroeker - Cross

1 this is the fourth quarter 2016 earnings call. Correct?

2 A. Yes.

3 Q. So this is now several months after the New York low-income
4 order is out, correct?

5 A. I believe the New York income order came into effect in
6 December of '16. Is that correct?

7 Q. Well, we'll let the record speak for itself. The
8 low-income order was --

9 A. You're asking me questions. I guess my answer is I don't
10 recall.

11 Q. That's fair. But the low-income order was still enjoined
12 at this time, correct?

13 A. I don't believe so, but that's why I'm saying I don't
14 recall.

15 Q. OK. So we'll see --

16 A. I thought it went into effect in December of '16, but I
17 could be mistaken.

18 Q. But the New York resetting order, that was still a vacatur,
19 right?

20 A. Correct.

21 Q. So let's go to page 9 of this transcript. And in the
22 middle, there is Mr. Driscoll again, from FBR, and he's talking
23 about his favorite topic. He says, "Just last question.

24 Nathan, maybe you could characterize, obviously, very public
25 ongoing dispute with the State of New York, not just yourself,

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Kroeker - Cross

1 with other energy retailers. Just give us an update where that
2 stands and the characterization of what you envision the
3 potential couple of outcomes could be from what's going on in
4 the State of New York." Do you see that?

5 A. Yes.

6 Q. And you tell him the following. You say, "I mean, as you
7 pointed out, it's an interesting time in the industry in New
8 York. We're very happy that the courts have sided with us
9 earlier in 2016." Do you see that?

10 A. Yes.

11 Q. And you then talk about different things that -- well,
12 rather than read the whole thing, let's go to the last
13 sentence. You say, "and I'm not anticipating -- I'm fully
14 expecting that we're going to have a healthy market beyond 2016
15 and -- or beyond 2017 and '18 and going forward. And we'll be
16 able to comply with whatever changes we collectively determine
17 we need to make in that market." Do you see that?

18 A. I do. I believe I'm speaking to the resetting order here,
19 not the low-income order. I don't mention the low-income
20 order. I believe that was already in effect at this point.

21 Q. OK. Well, we'll look it up. Another earnings call soon.
22 But -- and you talk about helping market in New York, correct?

23 A. Yes.

24 Q. That was a true statement to Mr. Driscoll?

25 A. Yes.

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Kroeker - Cross

1 Q. And you're making the statement already now as of March
2 2017, correct?

3 A. Correct. And when I say "healthy market," that's in the
4 context of the part that was skipped where we talked about rule
5 changes and other things that we're going to have to do
6 collectively as an industry to address the issues that the New
7 York commission is concerned about.

8 Q. You're not saying in here that you're concerned that Major
9 Energy is not going to be able to perform in New York, are you?

10 A. No. What I'm saying is, we're going to have to make some
11 changes to our business and rule changes in conjunction with
12 the commission. After that process, I believe we're still
13 going to be having a healthy market.

14 Keep in mind, part of Driscoll's concern at this point
15 was that New York was going to zero. Right. Because the
16 resetting order would have done that. And so every quarter
17 he's there thinking, hey, you guys have a massive amount of
18 value tied up in New York. You doubled down on that value when
19 you bought Major. I think you guys just made a bad investment,
20 you know, put my fears at ease. And so every quarter he asks
21 me almost the exact same question. And I'm trying to explain
22 to him, look, it's not good but it's playing out reasonably
23 well, all things considered. We're going to have to make some
24 changes. Ultimately I think we will have a healthy market
25 going forward.

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Kroeker - Cross

1 Q. I'm sorry. Could you show me in this paragraph where you
2 said "it's not good"?

3 A. What's that? I didn't state that in this paragraph.

4 Q. OK.

5 A. Carter, Carter's view was, it's not good.

6 Q. But you don't say, "I share your view, Mr. Carter," did
7 you?

8 A. No. I'm explaining to investors that I think we can make,
9 you know, a good situation out of this very negative resetting
10 order, by working proactively with the commission to address
11 their concerns and to drive the bad actors out of the market.

12 Q. Let's go to PX 312. Do you see on Plaintiff's Exhibit 312,
13 so we're now August 2017. Do you see that?

14 A. Yes.

15 Q. So this is a transcript of Spark Energy Inc.'s second
16 quarter 2017 earnings call. Do you see that?

17 A. Yes.

18 Q. So we're about halfway through the earnout period, correct?

19 A. Yes.

20 Q. And you were on this call, correct?

21 A. Yes.

22 Q. And you made an oral presentation and answered questions
23 from analysts on this call?

24 A. I believe so.

25 Q. All right. Let's go to page 8 of the transcript at the

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Kroeker - Cross

1 top. There we have Mr. Driscoll. And he asks you for an
2 update on the New York regulatory environment, particularly the
3 low-income order that went into effect, correct?

4 A. Yes.

5 Q. And he asks who has the broader initiative as to whether
6 ESCOs are going to be able to continue to operate in New York
7 and your view could be -- sorry -- if you could kind of
8 quantify your exposure to low-income either in New York or
9 across portfolio. Do you see that?

10 A. I do.

11 Q. And you respond, "Thanks, Carter. Really three different
12 components when you look at New York. The first one" -- you
13 mention to him a specific show cause order that related to the
14 Spark business. That had been resolved and was behind Spark
15 and there was no financial impact on that, correct?

16 A. Correct.

17 Q. You then say, "The second piece, as you alluded to, is the
18 low-income." Do you see that?

19 A. Yes.

20 Q. And you say, "All retailers in the state received listings
21 of their low-income customers several weeks ago. And with the
22 expectation that if those low-income customers are not on
23 compliant products, they have to be turned back over to the
24 state. So we are working through that. I will tell you, it's
25 a relatively small number for us. It's somewhere in the range

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Kroeker - Cross

1 of 10,000 to 12,000 RCEs across all of our brands." You see
2 that?

3 A. Yes.

4 Q. And then you say, "a lot of those customers are on
5 fixed-price contracts today that roll off in the next 12 to 18
6 months." Correct?

7 A. Yes.

8 Q. And that was a truthful statement to Mr. Driscoll at the
9 time?

10 A. Yes.

11 Q. And then you talk about the third component, the broader
12 resetting order."

13 A. Can we go back to your question, though?

14 Q. Sure.

15 A. I say that this is a relatively small number for us, 10 to
16 12 thousand RCEs relative to my overall business, which was at
17 or above a million RCEs at that point. That's where I'm coming
18 from.

19 Q. I understand. So 10 to 12 thousand over a million RCEs,
20 correct?

21 A. Yes.

22 Q. So then you discuss the resetting order. "We have been
23 working very closely with other ESCOs in this space through a
24 couple of industry organizations, working very cooperatively
25 with the commission to come up with a set of rule changes that

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Kroeker - Cross

1 I think ultimately improves the overall quality of the market."

2 See that?

3 A. Yes.

4 Q. "It's too early for us to know what those rule changes are
5 going to be. I'm anticipating they're going to be things that
6 we've seen before in other markets in which we operate. And
7 I'm anticipating it's going to require us to either change some
8 of our sales practices, our disclosures, maybe our product
9 suite. But ultimately, I think we end up with a healthy
10 business in New York going forward longterm." You see that?

11 A. Yes.

12 Q. Now, again, this is about halfway through earnout period?

13 A. Yes.

14 Q. Let's go to Plaintiff's Exhibit 314. All right. Now we
15 are at November 3, 2017, the third quarter 2017 earnings call
16 transcript. So we're about 20 months into the 33-month earnout
17 period, correct?

18 A. OK. Yes.

19 Q. And you participated on this call?

20 A. Yes.

21 Q. And you answered questions from analysts on this call?

22 A. I believe so.

23 Q. So let's look at page 9, towards the bottom. It is not
24 Mr. Driscoll. It is Sophie Karp. Do you see that?

25 A. Yes.

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Kroeker - Cross

1 Q. From Guggenheim. She says, "First, could you tell us, what
2 are you thinking at these levels on share buybacks potentially?
3 Secondly, is there any update on the regulatory proceeding in
4 New York that you think is meaningful that you'd like to
5 share?" See that?

6 A. Yes.

7 Q. Let's go to page 10. In the first part you're answering
8 her first question. And you say, at the top, "On the
9 regulatory front, there's two pieces there. The first one is
10 the low-income moratorium. There's currently a stay on that."
11 Do you see that?

12 A. Yes.

13 Q. So as of November 2017 -- right? 20 months into the
14 earnout, the low-income order at this point is still stayed,
15 correct?

16 A. So this refreshes my memory. I'd like to clarify something
17 I said earlier. I said I believed that came into effect
18 December of '16. I'd like to change that to December of '17.

19 Q. Thank you.

20 "And the courts are going to revisit that here in
21 November." You see that?

22 A. Yes.

23 Q. And then you say, "Whatever the outcome of that is, and I'm
24 fully anticipating that we're going to have to turn a few
25 low-income customers back over to the utility over the next six

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Kroeker - Cross

1 to eight months, but that's less than 2 percent of our overall
2 business, so relatively insignificant to us." Remember saying
3 that?

4 A. Yes.

5 Q. And that was a truthful statement, right?

6 A. Yes.

7 Q. And that's about the low-income order; isn't that true?

8 A. Yes.

9 Q. Then you say, "the bigger piece of this is the broader
10 resetting order, and there's currently hearings scheduled for
11 late November on that piece." And again at this point that's
12 still vacated, correct?

13 A. Yes.

14 Q. And you talk about some motion practice going on there,
15 right?

16 And you say, "and at the end of the day, my position
17 on this really hasn't changed from where it was nearly two
18 years ago." Do you see that?

19 A. Yes.

20 Q. And that was a truthful statement.

21 A. Yes.

22 Q. "I think what you're going to end up with is, you're going
23 to have ESCOs, ourselves included, that are going to work
24 proactively with the commission and get a set of rule changes
25 or disclosure requirements or financial commitments overall

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Kroeker - Cross

1 that will improve the health of the market but will allow
2 retailers to continue to have healthy ongoing businesses in
3 that marketplace." Do you see that?

4 A. Yes, I do.

5 Q. And that was a truthful statement, correct?

6 A. Yes.

7 Q. And that was made as of November 2017, right?

8 A. Yes.

9 Q. Let's look at PX 299. This, just to refresh your
10 recollection, this is a 10-K for 2017 filed on 3/9/2018 by
11 Spark. Do you see that?

12 A. I do.

13 Q. And you obviously reviewed and signed this, correct?

14 A. Yes.

15 Q. So this is filed two years into the earnout, approximately.
16 Right?

17 A. Yes.

18 Q. Let's go to page 20 of this 10-K, second paragraph. On the
19 bottom you say, "The company and its subsidiaries are dropping
20 low-income customers to the applicable utilities in the next 12
21 months as they roll off their contracts. These customers
22 represent approximately less than 1 percent of our total
23 customers as of December 31, 2017." Do you see that?

24 A. Yes.

25 Q. And that was a statement to shareholders, right?

K33AHOR2ps

Kroeker - Cross

1 A. Yes.

2 Q. And that was made in March 2017.

3 A. Yes.

4 Q. I'm sorry. March 2018. Sorry.

5 A. Correct.

6 Q. Two years into the earnout. Correct?

7 A. Yes.

8 Q. Let's go to -- it will be the last one. OK. Let's go to

9 PX 313. So we are now August 3rd, 2018. Do you see that?

10 A. I do.

11 Q. That's a few months before the end of the earnout period,
12 right?

13 A. Yes.

14 Q. And you recall being on this call?

15 A. Yes.

16 Q. And this is the second quarter 2018 earning call?

17 A. Yes.

18 Q. And you recall being asked questions from analysts on this
19 call?

20 A. Generally yes.

21 Q. Let's go to the top of page 10. So I guess we need to go
22 to the bottom of 9. Excuse me. So this is not Mr. Driscoll
23 either, is it?

24 A. It's Michael Gyure.

25 Q. OK. And he asks, "Are you seeing anything, I guess, new or

K33AHOR2ps

Kroeker - Cross

1 different that changed your thought process on what's going on
2 in New York? And I guess what are you hearing there from that
3 perspective?"

4 And your answer is, "New York, no." You see that?
5 A. I do see that.

6 MR. DAHAN: I don't know if your Honor wanted to take
7 a few-minute break. Let me know. I have a new topic. It's up
8 to you.

9 THE COURT: Yes. I'd like to take about ten minutes,
10 since it's about midmorning for us. Again, we'll go till about
11 1 o'clock and then break for an hour for lunch. Let's take ten
12 minutes now.

13 (Recess)

14 THE COURT: Good morning. Welcome back.

15 Mr. Dahan, you may proceed.

16 MR. DAHAN: Thank you, your Honor.

17 BY MR. DAHAN:

18 Q. So in your witness statement, you have a section that
19 starts on page 67, and it's, "During the earnout period,
20 regulatory developments prompted Major Energy to modify its
21 business plan." Do you see that?

22 THE COURT: Could you refer to paragraph numbers,
23 because the pages are sometimes off.

24 MR. DAHAN: Sure. It's the heading right before
25 paragraph 237. Sorry.

K33AHOR2ps

Kroeker - Cross

1 A. I see that.

2 And just to correct, you said "business plan." It's a
3 business model.

4 Q. Thank you. I'll just for the record read it again.

5 "During the earnout period, regulatory developments prompted
6 Major Energy to modify its business model." Do you see that?

7 A. Yes.

8 Q. And you go on to talk about the low-income order. Do you
9 see that?

10 A. Yes.

11 Q. You talk about Illinois. Right?

12 A. Yes.

13 Q. And you claim, in paragraph 238, "One such change was the
14 shift in focus from residential customers to commercial
15 customers, particularly in the New York market." Do you see
16 that?

17 A. Yes.

18 Q. And then you go on to discuss the low-income order. Right?

19 A. Yes.

20 Q. Which, again, didn't even come out till sometime second
21 half of 2016. Correct? It wasn't even announced.

22 Seven -- no.

23 A. No. I believe it was announced in '16, went into effect in
24 '17.

25 Q. That's right. I understand.

K33AHOR2ps

Kroeker - Cross

1 So I want to show Plaintiff's Exhibit 481. So
2 sometime late 2014, Spark looked at a potential purchase of
3 Major Energy, correct?

4 A. Yes.

5 Q. And in connection with that it received a management
6 presentation from Major Energy?

7 A. Yes.

8 Q. And that management presentation was dated November 2014.
9 If we go to the slide, that would be page 43. If we go to
10 slide 43, to "agent sales." Do you see that?

11 A. Yes -- sorry. My screen just went blank. OK. I'm with
12 you.

13 Q. You have it there?

14 A. Yes.

15 Q. OK. Great. And the "agents/brokers," that refers to part
16 of the commercial business of Major Energy, right?

17 A. I don't know that this is specific to commercial. I
18 believe this could also be residential.

19 Q. OK. So we'll look at the bullets here.

20 So it first says, "Major works with 182
21 agents/brokers." You see that?

22 A. Yes.

23 Q. It says, "115 of these have brought in accounts in 2014."

24 A. I see that.

25 Q. Then it says, "Total RCEs acquired in 2014 is 25,204

K33AHOR2ps

Kroeker - Cross

1 through September 2014." You see that?

2 A. Yes.

3 Q. And then the third bullet says "65 percent of sales are to
4 commercial accounts." Do you see that?

5 A. Yes.

6 THE COURT: Remind me, RCEs, again, is what?

7 THE WITNESS: Residential customer equivalents.

8 THE COURT: Thank you.

9 Q. If you go to slide 15, which is PDF page 29. This says
10 "residential and commercial customer breakdown." Do you see
11 that?

12 A. I do see that.

13 Q. And in the different circles, there's a portion that's
14 residential and a portion that's commercial, correct?

15 A. Yes.

16 Q. And for the customers, electric, it says 5.8 percent
17 commercial. Do you see that?

18 A. I do.

19 Q. This is as of the November 2014 presentation, right?

20 A. It says as of October 2014.

21 Q. Right. I'm sorry. This is in the November 2014
22 presentation, right?

23 A. Yes.

24 Q. If we could go to PX Plaintiff's Exhibit 359. So now when
25 NGE is, in early 2016, looking to buy Major Energy, it received

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Kroeker - Cross

1 an updated management presentation from Major Energy. And this
2 e-mail is, on the bottom you can see it's Cliff Adams at Coady
3 Diemar sending it on January 27, 2016 to Dave Hennekes, Paul
4 Konikowski. Do you see that?

5 A. I see that.

6 Q. And at this point in time, there's no New York resetting
7 order. Correct?

8 A. That's correct.

9 Q. It wasn't even announced at this point, right?

10 A. Correct.

11 Q. There's no New York low-income order, is there?

12 A. No.

13 Q. If you go to slide 16 of this presentation, it's the PDF
14 page 18. So sometime between -- we saw this slide on the prior
15 one, right? And remember we saw, in that top left corner
16 before, we saw 5.8 percent?

17 A. Yes.

18 Q. But sometime between that November 2014 presentation and
19 now the January 26 presentation, before the resetting order,
20 before the low-income order, customer electric now represents,
21 in the commercial, 10.7 percent. Right?

22 A. Yes.

23 Q. It went from 5.8 percent to 10.7 percent, right?

24 A. Yes.

25 Can you go back to the other slide for me for a

K33AHOR2ps

Kroeker - Cross

1 second?

2 Q. Sure.

3 A. The equivalent pie charts from the November '14
4 presentation.

5 Q. Yes. So that was in PX 481, and that would have been slide
6 PDF page 29.

7 THE COURT: And, Mr. Dahan, you said January 26. I
8 think you meant January 2016. Right?

9 MR. DAHAN: Thank you so much, your Honor.

10 Q. So the one on the right, as you point out, the one on the
11 right was, as you pointed out, I think, as of October 2014.
12 And this on the bottom, I noticed it said as of December 2015.

13 A. I'm not sure where you're going with this, counsel, but
14 commercial customer accounts is kind of irrelevant. If you're
15 dealing with commercial accounts, you really need to be looking
16 at RCEs, which is a volumetric measure. So I think any
17 conclusion you're trying to draw on commercial electric counts
18 is irrelevant.

19 Q. All right. So how about if we look at RCEs.

20 A. OK. Sure.

21 Q. First of all, let's first go to slide 19, PDF page 21.
22 This would be the one on the left. You could put down 481,
23 Eric.

24 First of all -- and, again, this is before the
25 resetting order, before the low-income order.

K33AHOR2ps

Kroeker - Cross

1 A. This is back to the November 14 --

2 Q. This is January of 2016 presentation.

3 A. OK.

4 Q. No low-income order, no resetting order. Right?

5 A. OK. Correct.

6 Q. Heading: "Major's Recent Focus Has Been Growing Commercial
7 Electric." Do you see that?

8 A. Yes.

9 Q. Now, let's go to your RCE point. Let's go to slide 30,
10 which is 359-32. So this says, now there's 215 agents/brokers
11 brought in accounts in 2015 year to date. Do you see that?

12 A. Yes. Is this still the January 2016?

13 Q. That's correct. Because the prior one we saw was about 114
14 that brought in. You remember that?

15 A. Correct.

16 Q. Now it's 2015. That's about a hundred more agents,
17 correct, slash brokers, correct?

18 A. Yes.

19 Q. What does it say in the heading of the second bullet? Can
20 you read that.

21 A. "Total of 71,000 RCEs acquired in 2015."

22 MR. DAHAN: And then, Eric, if you put up the other
23 exhibit.

24 Q. What was the RCE count in the prior year?

25 If we go to slide 43, PDF 43.

K33AHOR2ps

Kroeker - Cross

1 That's at 25,000 through September 2014. Do you see
2 that?

3 A. I do.

4 Q. That's 50,000 more RCEs?

5 A. If you -- yes. If you're asking me just to do the math, I
6 agree with that.

7 Q. About three times the number we saw in the prior slide?

8 A. Yes. One is nine months. And keep in mind that was coming
9 off the back of the polar vortex. And the other one is 12
10 months in a year where you didn't have a significant impact.

11 Q. Did you prepare these presentations?

12 A. No.

13 Q. Do you know what is being held in this presentation?

14 A. I'm just reading the numbers off the page and doing the
15 simple math that you ask me to.

16 Q. OK. Now, in your witness statement, you also, again, talk
17 about regulatory issues in Illinois. Right?

18 A. Yes.

19 Q. And you mentioned also regulatory issues occurred in
20 Pennsylvania at some point?

21 A. Yes.

22 Q. So let's stick on the January 26 presentation, 2016
23 presentation. And let's go to the slide of 43 and 44. That's
24 PDF 45, I think.

25 A. I think we're on the wrong presentation.

K33AHOR2ps

Kroeker - Cross

1 Q. Yes. So PX 359, Eric, and slide 45.

2 So here's the slide being provided to NGE in January
3 2016. Before the deal closed, right?

4 A. Yes.

5 Q. And are you aware that at this time in January, end of
6 January 2017, the deal terms are 60 million cash at closing, 20
7 million earnout. Correct?

8 A. I believe that's correct.

9 Q. Right, because it didn't change until sometime after
10 February, when the resetting order was announced, right?

11 A. I believe that's correct.

12 Q. So at this time NGE is still willing to pay 60 million cash
13 at closing and 20 million earnout, correct?

14 A. Again, I don't -- I'm looking at the same documents you are
15 because I was not part of that negotiation.

16 Q. And it's disclosed, "As fallout from the polar vortex,
17 Pennsylvania, Illinois, Maryland, and New York initiated
18 investigations into the company's marketing and sales
19 practices." Do you see that?

20 A. Yes.

21 Q. And it discusses the Pennsylvania regulatory matter. You
22 see that?

23 A. Yes.

24 Q. And it says, "Major intends to execute a settlement
25 agreement by mid February 2016 for 5.1 million." You see that?

K33AHOR2ps

Kroeker - Cross

1 A. Yes.

2 Q. "Major will agree not to market variable rates through
3 August 2017, but will be able to market door to door with
4 revised policies." Do you see that?

5 A. Yes.

6 Q. And, again, being told, NGE is still proceeding with the
7 deal, correct?

8 A. Yes.

9 Q. NGE is still proceeding with the 60 million cash at closing
10 deal, correct?

11 A. Correct.

12 Q. It then talks about Illinois. "In August 2014, the ICC
13 completed its investigations and initiated a show-cause order
14 that claimed deceptive sales practices, language-barrier
15 exploitation, and lack of disclosure statements." See that?

16 A. I see that.

17 Q. It said, "An agreement of \$262,500 was reached, and was
18 approved by ICC and CUB in April 2015." You see that?

19 A. I see that.

20 Q. And that's the ICC matter you discussed in your report --
21 in your witness statement, correct?

22 A. Can I go back to my witness statement?

23 Q. Sure.

24 A. Yes. My witness statement references, in addition to the
25 ICC issue, references the Illinois AG matter as well.

K33AHOR2ps

Kroeker - Cross

1 Q. Yes, we'll get to that. But for purposes of the ICC
2 matter, that was an existing matter. An agreement was reached
3 on settlement, NGE is being told about it, and NGE is still
4 offering 60 million in cash at closing. Correct?

5 A. Correct. The ICC matter is very small relative to the AG
6 matter.

7 Q. And that AG matter didn't come out until March 2018. Isn't
8 that correct?

9 A. I don't know the exact date of when that came out.

10 Q. You don't know if it was -- you think it came out in 2017?

11 MR. BROWN: Objection, argumentative.

12 THE COURT: Sustained.

13 Q. And if you go to the next slide, NGE is told about a
14 Maryland matter. You see that?

15 A. Yes.

16 Q. It's told about a New York AG matter in February 2015. You
17 see that?

18 A. I do.

19 Q. And, again, at this point, NGE is still offering \$60
20 million in cash at closing. Correct?

21 A. That's my understanding, yes.

22 Q. Now, so we established before that the dropdown transaction
23 occurred on August 23, 2016, correct?

24 A. Yes.

25 Q. Now, in your witness statement, in paragraph 122 -- we can

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Kroeker - Cross

1 go to that -- you state that you can "see from the terms of the
2 earnout agreement and the executive earnout agreement, which
3 were specifically incorporated into the MIPA, that consent was
4 not technically necessary for a dropdown among affiliates.

5 This letter agreement was signed for belt-and-suspenders
6 purposes to account for the position that sellers maintained,
7 which was that consent was required." Right?

8 A. Yes.

9 Q. And the letter agreement you're referring to is an August
10 23, 2016 letter agreement, correct?

11 A. I believe so.

12 Q. So let's unpack that paragraph. First, I want to show you
13 the Spark MIPA, Plaintiff Exhibit 650. You've seen that
14 before, right?

15 A. Yes.

16 Q. And that's the Spark MIPA?

17 A. Yes.

18 Q. You signed the Spark MIPA?

19 A. I believe so.

20 Q. If we could turn to 07 of this document. So there is a
21 definition for "adjusted EBITDA plan." Do you see that?

22 A. Yes.

23 Q. Can you read what it says for the target year 2016 into the
24 record.

25 A. "\$20,749,213 for the 2016 target year for the 12 months

K33AHOR2ps

Kroeker - Cross

1 ended December 31, 2016."

2 Q. Thank you. And that \$20.7 million number is the same
3 number that we saw in the MIPA, correct?

4 A. Yes.

5 Q. Now if you to turn to Section 3.2, which would be page 20
6 of this agreement.

7 MR. DAHAN: 25 for you, Eric.

8 Q. And you see article 3?

9 A. Yes.

10 Q. And you had a chance to review this before you signed it,
11 correct?

12 A. Yes.

13 Q. And it says, in (a), "At closing, buyer shall deliver the
14 following documentation or shall take the following action."
15 Right?

16 A. Yes.

17 Q. And we go to the next page, (ix). One of the things that
18 the parties to this agreement agreed to was that one of the
19 things that was to be delivered to the seller was "the written
20 consent of the prior sellers' representative to the
21 assignment." Right?

22 A. Yes.

23 Q. And the sellers' representative is Saul Horowitz, correct?

24 A. Yes.

25 Q. And the assignment at the bottom of this agreement is the

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Kroeker - Cross

1 omnibus assumption assignment agreement, correct?

2 A. I have to look at the definition.

3 THE COURT: He can look at the definition.

4 Q. OK. We'll go to 08. You see the definition on top,
5 "assignment," saying it's "the omnibus assignment and
6 assumption agreement executed by the parties in the form
7 provided until Exhibit A"?

8 A. OK. Yes.

9 Q. And if you go to Section 11.1 of this agreement, which
10 would be 061, Eric, "for purposes of this agreement, seller,"
11 which is NGE, "has advised buyer that: notices of certain
12 matters arising under the prior purchase agreement" -- you
13 understand that "prior purchase agreement" is the MIPA that was
14 executed on March 18, 2016?

15 A. Yes.

16 Q. -- "must be provided to Saul Horowitz, as sellers'
17 representative." You see that?

18 A. Yes.

19 Q. And then it says, (ii) the prior written consent of said
20 prior sellers' representative is required for the assignment of
21 certain transaction agreements." You see that?

22 A. Yes.

23 (Continued on next page)

K337HOR3

Kroeker - cross

1 BY MR. DAHAN:

2 Q. And then it says, 3, "Seller will assume responsibility for
3 providing any such notices to, and securing any such consents,
4 of buyer's seller's representatives as necessary under such
5 prior purchase agreement." Do you see that?

6 A. Yes.

7 Q. And you had a chance to read that before you signed the
8 agreement, right?

9 A. Yes.

10 Q. And so we're clear, the sellers did not participate in the
11 drafting of this agreement, did they?

12 A. Not to my knowledge.

13 Q. The sellers didn't have this provision in this agreement,
14 did they?

15 A. Not to my knowledge.

16 Q. They didn't have the one we saw in 3.1 before, did they?

17 A. Refresh my memory. What was 3.1?

18 Q. The closing requirements.

19 A. Yes, I don't believe so.

20 Q. And if we go to what was Exhibit A to this agreement, that
21 would be PX 651. Exhibit A is the omnibus assumption
22 agreement. Do you see that?

23 A. Yes.

24 Q. And you were going to be a signatory to this agreement,
25 right?

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Kroeker - cross

1 A. Yes.

2 Q. And if we go to 02, Eric.

3 You see that one of the parties that's being made a
4 party to this agreement is Saul Horowitz.

5 A. Yes.

6 Q. Acting on behalf of, and to confer the consent of, all of
7 the prior members and prior sellers of interests in Major
8 Energy. Do you see that?

9 A. Yes.

10 Q. And again the sellers did not participate in the drafting
11 of this agreement, did they?

12 A. I don't believe so.

13 Q. They didn't say please put this in the agreement, did they?

14 A. Again, I don't recall the specifics of who was involved and
15 what was shared in this.

16 Q. And if you go to 06, Eric.

17 You see Mr. Gibson, he would be signing for National
18 Gas & Electric?

19 A. Yes.

20 Q. As executive vice president and CFO of NGE, right?

21 A. Yes.

22 Q. And, by the way, that's the only time you see Mr. Gibson's
23 name on that page, right?

24 A. Correct.

25 Q. And then there are three signature blocks for Major Energy;

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Kroeker - cross

1 do you see that?

2 A. Yes.

3 Q. And each one was going to be signed by Dan Alper, the CEO
4 of Major Energy, right?

5 A. Yes.

6 Q. And then there is the block for sellers' representative
7 Mr. Horowitz.

8 A. Yes.

9 Q. And then there is your signature block, right, by Spark
10 Energy, Inc., its managing member Spark HoldCo. Do you see
11 that?

12 A. Yes.

13 Q. Eric, if you could move this to the side but keep it up,
14 and let's go to the final executed version which is PX 656.

15 THE COURT: Mr. Dahan, what was the date of the draft
16 650?

17 MR. DAHAN: It was attached to the May 3, 2016, so we
18 would assume as of that date.

19 Q. So this is August 23, 2016, right?

20 A. Yes.

21 Q. And, Eric, if you could go on PX 651 on the left and turn
22 to the similar page, it would be 02.

23 Mr. Horowitz is no longer there, correct?

24 A. Correct.

25 Q. He is no longer there to be joined acting on behalf of the

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Kroeker - cross

1 prior sellers, right?

2 A. Correct.

3 Q. And if we go to the signature block of this one, Eric, and
4 of the prior one.

5 Do those two look the same to you, Mr. Kroeker?

6 MR. BROWN: Objection. Argumentative.

7 THE COURT: I will allow it. Fine.

8 Q. Do you notice Mr. Gibson is signing four times?

9 A. Yes.

10 Q. There is no Mr. Horowitz on there?

11 A. Correct.

12 Q. So, we talked before about that August 23, 2016 letter
13 agreement, right?

14 A. Yes.

15 Q. Let's go look at that. That's DX 998, Defendant's Exhibit
16 998.

17 And again in your witness statement in paragraph 122
18 you say "This letter agreement was signed for belt and
19 suspender purposes to account for the position that sellers
20 maintained which was that consent was required." Right? Do
21 you remember that testimony?

22 A. Yes.

23 Q. So now this letter is sent to you, right?

24 A. Yes.

25 Q. And I think if we go to the next page it's sent from

K337HOR3

Kroeker - cross

1 Mr. Gibson?

2 A. Yes.

3 Q. Now, you have seen this -- you have read this letter
4 agreement?

5 A. Yes.

6 Q. In its entirety?

7 A. Yes.

8 Q. More than once?

9 A. At least once.

10 Q. Can you point to me the words "belt and suspender"?

11 A. No.

12 Q. You say also in paragraph 122 from your witness statement,
13 in the last sentence, "Indeed, even though they knew that the
14 earnout agreement and the executive earnout agreement were
15 freely assignable by NGE to Spark without the need for consent,
16 Horowitz and Wiederman still pushed this issue, which is why
17 the letter agreement was signed as a formality to account for
18 the contingent risks associated with their behavior."

19 Do you see that?

20 A. Yes.

21 Q. Can you point in this letter where it says this is entered
22 into as a formality to account for the contingent risks
23 associated with Mr. Horowitz or Mr. Wiederman's behavior?

24 A. I said it in my direct statement. I didn't say it was in
25 the letter.

K337HOR3

Kroeker - cross

1 Q. Can you show me where in this letter it says that Spark
2 believes that consent is not required?

3 A. No, that's not in the letter.

4 Q. In fact --

5 A. I think the facts and the timeline will indicate that we
6 had conversations about the dropdown since 2015 as a form of
7 bridge financing. It was always the intention, the sellers
8 knew that, they issued their own press release to that effect.

9 This refusal to provide consent came up very close to
10 the time of the dropdown, and so this letter was put in place
11 as "belt and suspenders" and a formality to execute this
12 transaction.

13 Q. Mr. Kroeker, do you remember your testimony early on today
14 I asked you did you have any conversations with any of the
15 sellers between November 2015 and April 15, 2016, and your
16 answer was no, right?

17 A. Correct, but I did have conversations with them in early
18 2015, which is what I'm referring to here.

19 Q. OK, let's change gears. I think we heard Mr. Driscoll say
20 that before, right?

21 Isn't it true that when Spark acquires a company, the
22 first thing it does -- the first thing -- is take out the
23 supply agreement or the credit sleeve it's acquiring?

24 A. We did that in most of our acquisitions. We did not do
25 that on Major Energy.

K337HOR3

Kroeker - cross

1 Q. Isn't that the first thing Spark normally does?

2 MR. BROWN: Objection. Asked and answered.

3 A. Yes, with the exception of this Major Energy transaction.

4 We left it in place until the end of March 2017.

5 Q. And in fact taking out a supply agreement is an instant
6 synergy that's Spark then realized; isn't that right?

7 A. Yes.

8 Q. And isn't it true that from day one Spark's plan all along
9 was to take over the PSE supply contract; isn't that true?

10 A. Yes.

11 Q. Now isn't it true that when Spark acquired a company, the
12 next thing it does -- and pretty quickly -- is to take over the
13 treasury and accounting functions of that company?

14 A. Yes.

15 Q. And Spark also seeks to realize synergies by shutting down
16 office locations, making head count reductions and
17 consolidating all of operations on decision making to Spark's
18 headquarters in Houston? Isn't that right?

19 A. No, what we do in the play book that you're referencing is
20 we take over the critical functions that are required from a
21 SOX perspective, Sarbanes Oxley perspective, which would be
22 cash distributions and preparing the financial statements. We
23 also take over the supply, because that is a significant
24 synergy. All of the sales, marketing operations, day-to-day
25 decision making, any of that we don't integrate that until

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Kroeker - cross

1 after the earning period, and that's been consistent since Star
2 Provider, Verde, any of the acquisitions we had earnouts. I
3 believe we disclosed that in our investor relations material as
4 well.

5 Q. Now, in your witness statement, in paragraph 132, you say
6 "Over the course of the earnout period, Spark allocated
7 approximately \$14 million in costs to Major Energy, meaning it
8 provided \$4 million in support to Major Energy but did not
9 charge that allocation to Major Energy for the purposes of the
10 contingent payment assessment."

11 Do you see that?

12 A. Yes.

13 Q. And then you give some examples. Do you see that?

14 A. Yes.

15 Q. You did not cite any document to support that statement,
16 did you?

17 A. No.

18 Q. Now --

19 A. And that may have been an oversight. There is a detailed
20 calculation that I reviewed this week in preparation for this
21 trial that shows that calculation.

22 Q. OK. Now, in your witness statement, in the heading above
23 paragraph 134, you say "Spark affirmatively boosted Major
24 Energy's customer counts."

25 Do you see that?

K337HOR3

Kroeker - cross

1 A. Yes.

2 Q. And you talk about how in March of 2018, right? Do you see
3 March 2018?

4 A. Yes.

5 Q. That is two years into the earnout, right?

6 A. Yes.

7 Q. So two years into the earnout Spark boosted Major Energy's
8 customer counts by transferring about 9600 customers it
9 acquired to Major Energy including about 4500 customers from
10 HIKO energy, correct?

11 A. Yes.

12 Q. And in fact the transfer of HIKO customers in the next
13 paragraph wasn't until April 2018, right?

14 A. That's correct.

15 Q. So that didn't happen in 2016 or 2017, right?

16 A. Did not.

17 Q. And in your witness statement you estimate that such
18 customer transfer two years into the earnout added \$100,000 in
19 adjusted EBITDA to Major Energy, correct?

20 A. Yes.

21 Q. What was the total adjusted EBITDA for Major Energy in
22 2018, do you recall?

23 A. I don't recall off the top of my head.

24 Q. If you look at paragraph 244 of your witness statement you
25 have a break-down of sort of projected versus actual. Do you

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Kroeker - cross

1 see that?

2 A. Yes.

3 Q. Maybe just keep that open because we may go back to it.

4 A. Sure. The answer to your question \$15,952,497.

5 Q. OK. And what was the target for that year?

6 A. 27,831,052.

7 Q. OK. So if I understand your testimony, you boosted through
8 that transfer Major Energy's adjusted EBITDA \$100,000 and its
9 total was \$15.9 million, correct?

10 A. Not quite. We boosted it \$200,000. There was \$100,000 we
11 gave them credit for to cover their additional G&A costs
12 associated with that.

13 Q. So they would have gotten to like 16 million?

14 A. Correct, \$200,000.

15 Q. 11 million under budget still, right?

16 A. Yeah. Let me back up. It's 11 million below the adjusted
17 EBITDA plan number in the MIPA.

18 Q. Right. And it's your position that the sellers -- or is it
19 your position -- sorry. Is it your position that the sellers
20 benefited from this customer transfer an addition of \$100,000
21 in adjusted EBITDA to Major Energy in 2018?

22 A. In hindsight they did not benefit from it. At the time
23 they could have. If they had been within the range of the
24 customer count, those additional customers would have been. As
25 it turns out, they were below the range to where that was

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Kroeker - cross

1 relevant.

2 Q. So you made this transfer sometime in 2018, right?

3 A. Right.

4 Q. What was the total customer count with this transfer --

5 A. I don't recall.

6 Q. Let's look at your paragraph 244. What is 2018's actual
7 customer count?

8 A. You asked me at the time of the transfer which was in
9 April. I don't know what their customer count was in April.

10 Q. I understand. I understand. Let me rephrase that. What
11 was the total 2018 customer count including this transfer for
12 Major Energy in 2018?

13 A. \$120,965.

14 Q. What was the projected for the year?

15 A. 231,717.

16 Q. So that's 110,000 customers below projection, right?

17 A. Correct.

18 Q. So when you made this transfer, it's possible you think
19 they may have still gotten another 110,000 customers?

20 A. That's not what I said. I said at the time we made the
21 transfer do I think they would have had the ability to get back
22 within the range where it would have increased their earnout
23 payment or their cash installments. I believe that is yes.

24 Q. What is the total earnout payment to the sellers for 2018?

25 A. Zero.

K337HOR3

Kroeker - cross

1 Q. How much earnout payment was there even in 2017? Earnout
2 payment, not cash installment.

3 A. I would have to look at some documents to see that.

4 Q. In paragraphs 151 through 175 -- we're not going to
5 obviously go through all of that -- but in those paragraphs you
6 talk about Major Energy employee departures, correct? You can
7 take a look.?

8 A. OK.

9 Q. You say in the first sentence "As an initial matter, Major
10 Energy did not suffer any harm because three employees, Sobel,
11 Moeller and Alper, resigned shortly follow the dropdown." Do
12 you see that?

13 A. I see that.

14 Q. That's David Sobel the CFO, Levi Moeller the COO, and Dan
15 Alper the CEO; isn't that correct?

16 A. Correct.

17 Q. They are not part of the IT staff, are they?

18 A. I don't believe so, though I do know that Sobel and Moeller
19 are involved in the operational side of the business.

20 Q. They are executives of the company; they are not your
21 average employee, right?

22 A. One of the things that Major has repeatedly reminded us of
23 is they are a very small team, very nimble, even the executives
24 are involved in the day-to-day operations.

25 Q. I understand that, but they are more than just regular

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Kroeker - cross

1 employees; they are key employees, correct?

2 A. Yes, yes.

3 Q. And even some of them senior management members -- part of
4 the senior management team?

5 A. I believe Dan Alper was defined as a senior management team
6 member in the MIPA, and I believe Sobel and Moeller were
7 defined as key employees in the MIPA.

8 Q. Now, you would agree that it would be normal for a company
9 to experience fall-out from resignations of its senior
10 management, correct?

11 A. Yes.

12 Q. And in fact you testified as such at your deposition; do
13 you remember that?

14 A. Yes.

15 Q. Now, as a CEO of an ESCO that has been involved in many
16 acquisitions, you would agree that a company can experience
17 substantial business risk if it were to lose members of senior
18 management or other key employees, correct?

19 A. Yes.

20 Q. And you would agree that a company could experience
21 significant business risks if it was to experience disruption
22 from its key door-to-door vendors and brokers, correct?

23 A. I would agree with that.

24 Q. Now, without getting into why, you are aware that Major
25 Energy lost several key employees shortly after the dropdown,

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Kroeker - cross

1 aren't you?

2 A. I'm not aware of that.

3 Q. You're not aware -- you're not aware of whether -- are you
4 aware of how large Major Energy's supply and pricing team was
5 at the time of the dropdown?

6 A. Approximately three people.

7 Q. Three people?

8 A. Four people maybe.

9 Q. How many of those three people left shortly after the
10 dropdown?

11 A. I don't know.

12 Q. Have you ever heard the name Nahemi Shore?

13 A. Yes.

14 Q. Ever hear the name Esther Moeller?

15 A. Yes.

16 Q. Do you know if they were in that group?

17 A. I believe they were.

18 Q. And did they leave shortly after the dropdown?

19 A. I don't know.

20 Q. You don't know. You have heard of Elliot Wolbrom?

21 A. Yes.

22 Q. Who was he?

23 A. The chief marketing officer I believe.

24 Q. And again without getting into why, did he leave shortly
25 after the dropdown?

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Kroeker - cross

1 A. He left at some point during the earnout period.

2 Q. You don't know if he left in 2016.

3 A. I mean I could go back to my witness statement and look at
4 the specifics to refresh my memory if you want, but I believe
5 it's in there.

6 Q. You would agree that marketing vendors and commercial
7 brokers are important relationships for an ESCO, correct?

8 A. Yes.

9 Q. And they were important for an ESCO like Major Electric;
10 isn't that correct?

11 A. Yes.

12 Q. Isn't it true that at some point during the earnout period
13 Spark's focus was to reduce the amount of large commercial
14 accounts at lower margins, particularly in the Northeast where
15 Major Energy primarily operated?

16 A. I agree with the first half of your statement. I do not
17 agree with the second half of your statement.

18 Q. I don't know what the first or the second half is.

19 A. Split it into two questions. You asked was it a focus of
20 Spark Energy to reduce its exposure to the low-margin large CNI
21 customers. That is a true statement. Coming out of the winter
22 of 2018 that was a stated effort of ours.

23 Your second part of that statement -- and again you're
24 correct it was up in the Northeast, primarily in New England;
25 it was all Maine and New Hampshire for the most part -- the

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Kroeker - cross

1 second part of your statement was is that where Major Energy's
2 business was concentrated. That's the part I would disagree
3 with. Their business was concentrated in New York.

4 And just to be clear, the large CNI that we were
5 looking to shed was almost exclusively on the brand/provider
6 brand platform.

7 Q. Now isn't it true that during the earnout period Spark
8 imposed certain margin policies on Major Energy?

9 A. That is not true.

10 Q. Not true, OK.

11 It's your testimony that Spark did not require Major
12 Energy to have certain margin thresholds than it had prior to
13 resale?

14 A. I do not believe we ever did that. If that were
15 communicated by a lower level employee, I would quickly pull
16 that back as soon as it came to my attention.

17 Q. OK. Forget about communicate. It's your testimony that
18 did not happen. Is that your testimony?

19 MR. BROWN: Objection. Asked and answered.
20 Mischaracterizes.

21 A. I would just restate the answer I already gave you.

22 Q. You've heard -- presale, to your knowledge, did Major
23 Energy need to get approval from its risk committee to do an
24 aggregation deal?

25 A. I don't know what their internal governance would have

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Kroeker - cross

1 been. I assume there would have been some sort of approval
2 process but I have no idea.

3 MR. BROWN: I'm sorry. I object to the last question.
4 It doesn't lay a foundation that Major Energy had a risk
5 committee, which there is no evidence of.

6 Q. That's my next question. Do you know if Major Energy even
7 had a risk committee?

8 A. I don't know.

9 Q. Let's look at PX 458.

10 So this is an e-mail from Andy Davis to Murthy Rao and
11 Chris Leonard, July 6, 2017, updated risk policy.

12 A. Yes.

13 Q. And attaching a risk management policy updated June 2016 -
14 final. Do you see that?

15 A. Yes.

16 Q. And I guess Andy at e-mail says "Can you please send me the
17 current risk policy?" Do you see that?

18 A. Yes.

19 Q. So let's look at that policy. So here is the cover of the
20 policy, it lists a lot of entities on it. Do you see that?

21 A. Yes.

22 Q. And you see the Major Energy entities are in this policy,
23 do you see that?

24 A. Yes, this is all of the Spark Energy, Inc. subsidiaries.

25 Q. I understand that. Do you see the Major Energy three

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Kroeker - cross

1 entities in there?

2 A. Yes.

3 Q. And it's titled Energy Commodity Risk Management Policy.

4 Tell me the date on this policy.

5 A. June 2016.

6 Q. So there is no dropdown yet, is there?

7 A. Correct.

8 Q. In fact this is about a couple months before the dropdown,
9 right?

10 A. Correct.

11 Q. Now, you were one of three members on this risk committee;
12 isn't that correct?

13 A. Yes. Do you know if this risk policy was approved by the
14 board or approved by the banks, or is this just a draft?

15 Q. I can only tell what the e-mail says it is. It's not our
16 document and it says final, so...

17 A. We would have to go back and look, but I believe Murthy Rao
18 who updates this document was probably being proactive in
19 putting these names on here. This policy would not have
20 applied to the three major entities prior to the dropdown.

21 Q. But you're speculating right now, right?

22 A. Correct.

23 Q. And it does say "final" on the attachment, right?

24 A. Yes.

25 THE COURT: What's the date of the e-mail?

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Kroeker - cross

1 Q. It even says updated June 2016. Do you see that?

2 A. Yes.

3 Q. I don't know if your answer got on the record. You were
4 one of the three members on the risk committee, correct?

5 A. Yes.

6 Q. In fact let's go to 05 of this document. It lists the
7 three members of the risk committee, correct?

8 A. Yes.

9 Q. Yourself, Robert Lane, Murthey Rao. Do you see that?

10 A. Yes.

11 Q. No member of Major Energy was on this committee, right?

12 A. Correct.

13 Q. And anybody who is listed on this policy, the entities
14 identified on the policy have to comply with the policy,
15 correct?

16 A. It is my testimony that these legal entities would not have
17 had to comply with this policy prior to the dropdown.

18 Post-dropdown, yes. I can't explain the date on there for you,
19 but they would not have been subject to this policy prior to
20 the dropdown.

21 Q. And if we could go to 04, Eric.

22 I'm on the bottom, you see it says -- first of all, on
23 top, right? Now we're inside this document, right? And do you
24 see the Major Energy entities listed in there?

25 A. Yes.

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Kroeker - cross

1 Q. It's not a black line, is it? Do you see if this is a red
2 line? A black line? Or is it the final document?

3 A. No.

4 Q. And they are all identified collectively as the companies
5 or Spark, right?

6 A. Correct.

7 Q. So let's go out of the blow-up and go to the bottom,
8 unauthorized transactions. "Neither Spark" -- which again
9 includes any of the entities identified above -- "nor any of
10 its personnel will engage in transactions outside of the
11 guidelines and transaction limits established in accordance
12 with the policy."

13 Did I read that correctly?

14 A. Yes.

15 Q. Now, it's true that Major Energy was required to obtain
16 approval from Spark's risk committee in order to proceed with
17 an aggregation opportunity, right?

18 A. Yes.

19 Q. And Spark's risk committee had the final say on whether
20 Major Energy could proceed with a potential aggregation deal,
21 correct?

22 A. Yes.

23 Q. And isn't it true that in May 2017 Spark informed Major
24 Energy management that Spark's risk committee would only be
25 willing to entertain aggregation deals that are below 5,000

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Kroeker - cross

1 customers?

2 A. Correct. Moeller was presenting at that risk committee
3 meeting, and the risk committee adopted his recommendation.
4 His personal recommendation was he would not proceed with that
5 aggregation because of the risks associated with that
6 transaction.

7 Q. And that transaction -- that proposal was not a less than
8 5,000 aggregation opportunity, was it?

9 A. No, the note that came out following that decision was
10 where we implemented the 5,000. And the 5,000 was a guideline;
11 it was not part of the risk policy.

12 Q. So I understand your testimony, your testimony -- or is it
13 your testimony that Mr. Moeller told the risk committee that we
14 agree that there should be no aggregation deals that are above
15 5,000 customers? That's what he said to the risk committee?

16 A. No, that's not what he said to the risk committee. You can
17 go read it in his deposition. He recommended to the risk
18 committee that given the risks associated with that transaction
19 he would not recommend going forward with that deal if it were
20 up to him personally.

21 Q. And I'm not asking about that transaction. I understand
22 the decision made on that transaction. Future transactions.

23 A. Yes.

24 Q. He didn't say for future transactions anything above 5,000
25 should not be presented to the risk committee, did he?

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Kroeker - cross

1 A. No.

2 Q. Now, in your witness statement, paragraph --

3 A. I'm sorry. I want to elaborate on my answer before you
4 move on to something else.

5 We had a discussion at risk committee about continuing
6 to do smaller aggregation deals, and we agreed that if they
7 were smaller aggregation deals that did not require green fee
8 certification, we would be willing to go ahead and do those,
9 but we didn't specifically talk about what the definition of
10 "smaller" would be.

11 Q. But you are aware that the communication in the response to
12 Mr. Moeller said not more than 5,000.

13 A. Yes, I am aware of that.

14 Sir, you said witness statement. Which paragraph?

15 Q. 263. You say, "This culminated in Horowitz taking a new
16 approach which appeared coordinated between the senior
17 management team and the key employees of Major Energy to send
18 e-mails to Spark personnel for the purposes of manufacturing a
19 paper trail to create the misimpression that Spark was
20 interfering with the sellers' ability to run the business of
21 Major Energy, which was not accurate."

22 Do you see that?

23 A. Yes.

24 Q. Now, you don't cite any document in this paragraph, do you?

25 A. No.

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Kroeker - cross

1 Q. Now, you testify in paragraph 64 of your witness
2 statement -- so in the last sentence you say "Throughout my
3 involvement with the sellers I routinely went out of my way to
4 accommodate them and help the Major Energy business succeed,
5 but time and again, they advanced their personal financial
6 interests rather than the interests of Major Energy."

7 Correct, do you see that?

8 A. Yes.

9 Q. Now, you are aware that after the dropdown Mr. Sobel,
10 Mr. Moeller and Mr. Alper terminated their employment
11 agreements for cause and received severance payments, correct?

12 A. Yes.

13 Q. I think we saw a slide put up in opening about a total to
14 \$4 million and Mr. Alper was able to get \$2 million; you saw
15 that?

16 A. Yes.

17 Q. And are you aware that Mr. Horowitz and Mr. Wiederman would
18 have had that same right, right?

19 A. Yes.

20 Q. They too could have received millions of dollars in
21 severance payments, correct?

22 A. Correct.

23 Q. But they stayed on at Major Energy through their earnout
24 period and didn't collect on their severance; isn't that true?

25 A. That is true. They are also the only two out of the five

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Kroeker - cross

1 that were shareholders, which I believe is a significant
2 difference in why -- or at least that's what they explained to
3 me at the time why they didn't exercise their right while the
4 other three did.

5 Q. Right, they wanted to see it through; isn't that true?

6 A. They had more money to gain by staying on as shareholders
7 than by resigning.

8 Q. Well, apparently that didn't happen, right?

9 MR. BROWN: Objection.

10 THE COURT: Sustained.

11 Q. Let's talk about the earnout calculation. Now, we
12 established before that you had no involvement in the drafting
13 of the earnout agreement, correct?

14 A. Correct.

15 Q. You had no involvement in the earnout calculation
16 spreadsheets NGE and Major Energy were working on prior to
17 closing, did you?

18 A. Correct.

19 Q. And you had no involvement in the creation of the earnout
20 illustrations that were set forth in Exhibit A or B of the
21 earnout agreement, did you?

22 A. Correct.

23 Q. And you testified in your witness statement that you had
24 discussions with Gary Lancaster to determine how the
25 calculation of the earnout payment would work, correct?

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Kroeker - cross

1 A. Correct.

2 Q. And you testified that Mr. Lancaster emphasized section
3 2.2(b) of the earnout agreement with you multiple times. Do
4 you remember that?

5 A. Yes.

6 Q. And that that was an important point to you prior to the
7 dropdown, correct?

8 A. Yes.

9 Q. Now, prior to the dropdown you requested and reviewed some
10 Excel models of how to calculate the earnout; isn't that right?

11 A. Correct.

12 Q. And you were using this earnout model to better understand
13 the calculation so you could present -- better present the
14 proposed transaction to the Spark board; isn't that correct?

15 A. I believe that's correct.

16 Q. So let's look at Plaintiff's Exhibit 641. So here is an
17 e-mail -- why don't we just go to the early part of the e-mail,
18 the earliest -- all right. Let's go to the pdf page 2.

19 So on April 6 Mr. Hennekes of NGE sends you and Mr.
20 Konikowski the e-mail, correct?

21 A. Yes.

22 Q. And this is before the dropdown, right?

23 A. Yes.

24 Q. There is no sellers on this e-mail, are there?

25 A. No.

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Kroeker - cross

1 Q. There is no Major Energy employee on this e-mail, is there?

2 A. No.

3 Q. It says "Major deal sheet. Nathan: We also did an earnout
4 example showing 35 percent below and 35 above plan and the
5 corresponding impact to the purchase price multiple of
6 projected EBITDA."

7 Do you see that?

8 A. Yes.

9 Q. "This can be backup or if you like incorporated into memo.
10 See the table below. Also attached the spreadsheet where you
11 can adjust the percentage variances if you like by changing the
12 yellow shaded cells." Right?

13 A. OK.

14 Q. And then he has a chart here, right? Let's go up an
15 e-mail. Same day, a little later, Mr. Hennekes reaches out to
16 you again, again no sellers on this e-mail, right?

17 A. Correct.

18 Q. No Major Energy person on this e-mail?

19 A. Correct.

20 Q. And he says "Nathan, use this spreadsheet instead if you
21 want to play around with it. I found and corrected a small
22 error in the way cash installments were calculating at lower
23 variances. Any questions, please call me." Then he has his
24 card there. Do you see that?

25 A. Yes.

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Kroecker - cross

1 Q. Now let's go to the top e-mail. You a couple days later
2 send it to Georganne Hodges and Andy Davis at Spark, right?

3 A. Yes.

4 Q. It says "Attachments: Final-earnout example"

5 A. Yes.

6 Q. You say "Here is the interactive model to show how the
7 earnout works." Do you see that?

8 A. Yes.

9 Q. So let's look at that spreadsheet, which is 641A.

10 Now, first of all, you see there is a file folder? Do
11 you see that on the bottom, the spreadsheet has a file folder
12 "Mark's analysis"?

13 A. OK.

14 Q. And you have an understanding that referred to Mark
15 Wiederman?

16 A. Yes.

17 Q. You see a folder that says "Gary Lancaster analysis"?

18 A. No. Are you referring to the tabs at the bottom?

19 Q. Yes.

20 A. All right, I'm with you.

21 Q. So if we could make it a little bit -- like that I guess.

22 So you see there is a gray box area and it says
23 "Mark's analysis" within the gray box? Do you see that?

24 A. Yes.

25 Q. And then it says in the box to the right of that "Example

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Kroeker - cross

1 of earnout scenarios for 2016 and 2018." Do you see that?

2 A. I do.

3 Q. And it says "Below plan by 35 percent; plan achieved; above
4 plan by 35 percent." Do you see that?

5 A. Yes.

6 Q. And underneath it will say amounts for below plan by 35
7 percent; 100 percent of plan achieved; and above plan of 35
8 percent," with different results with cash installments. Do
9 You see that?

10 A. Yes.

11 Q. Now, plan achieved column in the main box here, do you see
12 that? No, in the example, the plan achieved in the middle
13 there. Now, it says cumulative three year adjusted EBITDA; do
14 you see that?

15 A. I do.

16 Q. And that the cumulative three year adjusted EBITDA is 73.6
17 million. Do you see that?

18 A. Yes.

19 Q. Now, 73.6 million, isn't that essentially 20.7 million plus
20 25 million plus 27.8 million, the numbers that were in the
21 earnout targets?

22 A. That looks out correct, yes.

23 Q. And it says if that happens -- can you tell me what it says
24 the total earnout is?

25 A. I mean this is an overly simplified model that I think is

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Kroeker - cross

1 being taken out of context. The whole point of Hennekes
2 sharing this with me was to demonstrate that the purchase
3 multiple stays in the three times EBITDA range even when you
4 stretch the model. This was not including any customer count
5 adjustments. It obviously doesn't include 2.2(b), and there
6 are other simplifications here.

7 Q. So, did he tell you don't use this because it doesn't
8 include 2.2(b)?

9 A. No. If you go back to his e-mail he said go play around
10 with this model so you can see the purchase multiple. OK?
11 This wasn't part of the main core of the spreadsheet that
12 either Gary or Mark created. This is something that Hennekes
13 stuck in here strictly for purposes of helping me draft a memo
14 to my board, to demonstrate to me that the purchase multiple --
15 if the business did extremely well, the purchase multiple still
16 stayed around 3, and if the business crashed the purchase
17 multiple stayed in 3. Which was very important to me because
18 we were trading north of five at the time.

19 Q. Do you see any deduction for the first quarter in this
20 spreadsheet?

21 A. No, that's not --

22 Q. For 2016.

23 A. That's not what the point of this was is what I'm saying.

24 Q. Let's look at -- now again the timing is this is April
25 2016, correct?

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Kroeker - cross

1 A. Yes.

2 Q. OK. Let's look at DX 395.

3 So we go to the bottom e-mail. We are now in
4 September 6, 2016, right?

5 A. Yes.

6 Q. Now, this is after June 2016, right?

7 A. Yes.

8 Q. And it's an e-mail from you to David Hennekes and Paul
9 Konikowski; subject, major three year model. And you ask "Can
10 one of you send me the 3 year model that supports the full \$35
11 million pay-out on the earnout? Thanks." Right, that's your
12 e-mail. Yes?

13 A. Yes.

14 Q. Let's go to the e-mail, the top e-mail, and Hennekes
15 responds to you same day, "Here is the earnout model. Is this
16 what you're looking for? Also attached Major's 3 year forecast
17 that forms the basis of targets for 2016 through 18."

18 Do you see that?

19 A. Yes, I see that.

20 Q. And this is September?

21 A. Yes.

22 Q. After June 2016, right?

23 A. Yes.

24 Q. Let's see what he sends you. 395A. He sends you a model
25 that says in the tab -- file folder, sorry -- "Major earnout

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Kroeker - cross

1 and cash installment." Do you see that?

2 A. I see that.

3 Q. Now, that is the only attachment in A, correct? There is
4 nothing on sheet 2, correct? We will look at that to make
5 sure. Nothing on sheet 3.

6 A. Correct.

7 Q. There is nothing saying here is Gary Lancaster's projected
8 model, correct?

9 A. Right.

10 Q. Let's go back to NGE's projected earnout.

11 If we could just pan a little bit smaller.

12 There you go again with the gray box, Mark's analysis
13 in the gray box, right? There is no green boxes above the
14 yellow, right?

15 A. Correct. It does point out that all of this is subject to
16 2.2(b) for the first year.

17 Q. Where is that?

18 A. Bottom right-hand corner.

19 Q. Where? "Subject to a proportional reduction for 2016"?

20 A. Yes.

21 Q. It says, "The rationale for these adjusted EBITDA
22 deductions is that Major shareholders shall share in every
23 dollar from one dollar and these adjusted EBITDA deductions
24 balance the risk between Major" --

25 A. Below that it says subject to proportionate reduction for

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Kroeker - cross

1 2016.

2 Q. Right. And the every dollar you believe was not for cash
3 installment. That's your testimony.

4 MR. BROWN: Objection. Mischaracterizes.

5 Q. Are you aware for the dollar-for-dollar reduction with
6 respect to the earnout portion?

7 A. So if I could I would like to see the exhibit that shows
8 the earnout calculation that we sent to the sellers every year,
9 the one that's the portrait orientation, because with that I
10 will be able to answer your questions a lot better, because I
11 don't know if there is a version of that in one of these
12 binders I have in front of me. That's the one I am most
13 familiar with.

14 Q. Now, you testified in your witness statement at length
15 about the dispute among the parties concerning the 2016 earnout
16 payment, correct?

17 A. Yes.

18 Q. Now, Spark made a payment of \$7.4 million around March 30,
19 2017 to the seller, forwarded in 2016 to Japan, right?

20 A. Correct.

21 Q. And under the terms of the earnout agreement I think you
22 saw yesterday payment was due essentially that day, correct?

23 A. Yes.

24 Q. So you would agree that the sellers are in their rights to
25 ask for a payment on the due date, right?

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Kroeker - cross

1 A. Yes.

2 Q. Now, you testified that after that payment you -- and if we
3 go to paragraph 255 -- you say after you sent the \$7.4 million
4 wire Mr. Horowitz continued to communicate aggressively and
5 "that while I disagreed with him, for the purpose of putting
6 Major Energy first, I engaged Lancaster to prepare another
7 calculation for negotiation purposes only that could help
8 bridge the gap between sellers' positions and Spark's positions
9 to help the parties find a reasonable resolution, which he
10 did."

11 Do you see that?

12 A. Yes.

13 Q. And you further testified in your witness statement that
14 that was for negotiation purposes only, a contingent compromise
15 offer? Right? You say that repeatedly, right?

16 A. Yes.

17 Q. Well, let's look at what you actually told the sellers on
18 April 12, 2017. Let's go to Defendant's Exhibit 539.

19 You have seen this e-mail before?

20 A. Yes.

21 Q. This is April 12, 2017 from you to Mr. Wiederman and
22 Mr. Horowitz. There are other cc's, right?

23 A. Yes.

24 Q. Major cash installment and earnout, right? You say "The
25 attached spreadsheet constitutes the earnout statement under

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Kroeker - cross

1 section 2.2(e) of the earnout agreement, right?

2 A. Yes.

3 Q. And you say "I wanted to follow up on our conversations
4 other over the past few weeks regarding the cash installment
5 and earnout, both in general and specifically for the 2016
6 calculation. I asked Gary to go back to the MIPA and the
7 earnout agreement and spell out, step by step, how those
8 numbers should be calculated in order to best fit both the
9 spirit and the letter of the agreement. Our goal was to make
10 sure we are all on the same page regarding the exact
11 calculation that covers not only the partial 2016 year but also
12 2017 and 2018."

13 Did I read that correctly?

14 A. Yes.

15 Q. You don't say in this e-mail I ask Gary to go back and do a
16 step-by-step analysis how I think you the sellers are
17 calculating the earnout, do you?

18 A. That's not in the e-mail. Keep in mind this e-mail is
19 nearly two weeks after the \$7.4 million was wired to the
20 sellers that we were talking about two minutes ago. In that
21 two week period there were extensive conversations both within
22 NGE and Spark as well as with the sellers discussing this
23 topic.

24 Q. But the answer to my question was no, right?

25 A. Correct.

K337HOR3

Kroeker - cross

1 Q. And the reality is you wanted to know Mr. Lancaster who was
2 involved in the negotiations of this agreement -- not you --
3 how do you think it should be calculated in order to best fit
4 both the spirit and the letter of the agreement? Isn't that
5 true?

6 A. Correct.

7 Q. Because you wanted to get to the truth.

8 A. I wanted to get to the right answer.

9 Q. That's correct. And so he prepared a memo so you could get
10 to the right answer; isn't that true?

11 A. Keep in mind I'm sitting in a situation where we're trying
12 to make the best of this acquisition. I think we concede it
13 was complicated. I had put forth my best faith effort into
14 what that calculation for the first year earnout was.
15 Initially it was 5.5 million. We then realized that we had
16 made a mistake; we had misunderstood a couple of key words
17 which were further reduced by. We then recalculated the
18 earnout, got the \$5.1 million. We sent that over. We got the
19 response from Saul that you just referenced. Saul does his own
20 calculation, and he gets to 7.403, sends it to me, copies his
21 deal counsel and says -- I'm sorry, I'm not sure if he copied
22 his deal counsel. Strike that. He sends it to me and copies
23 several others, and says you would be advised to wire this
24 transfer -- wire this money to us or we will proceed with legal
25 action. So now I'm under threat of litigation. I don't want

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Kroeker - cross

1 to go into litigation. We have a good business, we have a good
2 working relationship. I'm doing everything I can to avoid
3 getting into litigation with these guys, so I instruct my
4 Treasury Department to wire over \$7.403 million before deadline
5 that Saul has introduced even though there is really no basis
6 for that number. I don't understand the calculation that he
7 attached, but that's the number we wired over.

8 I then spend the next two weeks in discussion with
9 Major, with Gary, going back and forth, we agreed if we take
10 the sellers' position that you do not deduct Q1 in 2.2(b), what
11 would that calculation yield? And that calculation would yield
12 7.563. Then I go back to the sellers with this e-mail and say,
13 you know what, it's actually \$160,000 more than what you
14 calculated; we're willing to send you the additional 160 grand
15 if we can put the first year behind us and go back to running
16 the business.

17 Q. Again to my question. You don't say in here we believe
18 it's still 5.1 million but to avoid litigation here is 7.5
19 million. Do you say that?

20 A. I do not say that in this e-mail.

21 Q. Instead what you say is "After reviewing Gary's memo and
22 the notes from our conversation, we believe ..." Who is the
23 we?

24 A. I don't remember who I was referring to. Myself, my
25 management team, the people involved in doing the calculation.

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Kroeker - cross

1 Q. "We believe the proper number is 7.5 million for 2016." Do
2 you see that?

3 A. I see that. And my testimony today is the proper
4 calculation if you include 2.2(a), (b) and (c) in that
5 calculation. OK? I'm sorry. If you would ignore (b). This
6 is 2.2 ignoring 2.2(b).

7 Q. Where in your e-mail do you say to Mr. Horowitz, Saul, I
8 wanted to update you, if you ignore those provisions then we
9 believe the proper number is 7.5 million?

10 A. I didn't say that in this e-mail.

11 Q. You state in paragraph 269 of your witness statement -- in
12 269 you say that, Despite my good faith efforts no agreement
13 was reached between the parties for the year 1 contingent
14 payment and instead sellers had been overpaid for year 1
15 because of Horowitz's litigation threats. Right?

16 A. Yes.

17 Q. And there you're using litigation threats, right?

18 A. Yes.

19 Q. Then you say in 282 -- you recall the parties were going
20 back and forth between April and June on issues, disputes?

21 A. Yes.

22 Q. Then you say on June 21, 2017 Horowitz sent a response that
23 failed to address each of the detailed line items in the
24 memorandum and instead only focused on a handful of the add
25 back points in dispute and noting that "I do not think we will

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Kroeker - cross

1 make any progress at this point and we are at a stalemate."

2 Do you see that?

3 A. I do.

4 Q. And so at that point a stalemate existed, correct?

5 A. Correct.

6 Q. Now, at that point you didn't send a letter to the sellers
7 saying can you please return the 2 million over payment that we
8 made in good faith to you, did you?

9 A. No.

10 Q. And you didn't do that in August or September of 2017, did
11 you?

12 A. No.

13 Q. Then the sellers sued Spark in October of 2017; do you
14 recall that?

15 A. Yes.

16 Q. No more litigation threat; now it's actually a lawsuit,
17 right?

18 A. Correct.

19 Q. You didn't send a letter to them saying, well, give us back
20 our \$2 million overpayment, did you?

21 A. No.

22 Q. You didn't do that in November 2017, correct?

23 A. No.

24 Q. Not December 2017, correct?

25 A. No.

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Kroeker - cross

1 Q. Not January 2018, correct?

2 A. No.

3 Q. Not February 2018.

4 A. No.

5 Q. Instead, when you send them notice of what their payment
6 should be for 2017, without any notice to them -- or advanced
7 notice to them -- you just deducted it from what they deserved
8 for 2017. Isn't that true?

9 A. Yes, we deducted the overpayment from the prior year.

10 MR. DAHAN: I have nothing further, your Honor.

11 THE COURT: Thank you. It's about one o'clock. We
12 will break for lunch now for an hour. See you at 2 o'clock.

13 MR. DAHAN: Your Honor, can we move the exhibits in
14 after that?

15 THE COURT: Yes.

16 (Luncheon recess)

17 (Continued on next page)

K33AHOR4ps

Kroeker

A F T E R N O O N S E S S I O N

2:15 p.m.

NATHAN KROEKER, resumed.

THE COURT: Good afternoon. Before we continue, just in terms of schedule, I have a few other things going on. At 3 o'clock I actually have to do a sentencing hearing, which will be at 3 and probably be over at 3:30, and we'll just break then. Sorry. It starts at 3:30. So it will be about 3:30 to 4, but then we can continue on after that. So when we get to the 3:30 point, you don't need to take everything off your desks, but if you just move your things to the back table so that the lawyers can have some space, that would be great.

Did you want to move in documents?

MR. DAHAN: Yes, your Honor. If it's OK if I can do it from here.

THE COURT: Sure. Hold on one second. All right.

MR. MAROONEY: It's PX 251, PX 457, PX 756, PX 655. Defendant's Exhibit 2, Defendant's Exhibit 1028 and 1028A, Defendant's Exhibit 541. PX 256, PX 257, PX 316, PX 312, PX 314, PX 299, PX 313, PX 481, PX 359, PX 650, and PX 651, PX 656. Defendant's Exhibit 998. PX 458.

THE COURT: 458?

MR. DAHAN: Yes.

THE COURT: Yes.

MR. DAHAN: PX 641 and 641A. Defendant's Exhibit 395

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1 and 395A, and Defendant's Exhibit 539.

2 THE COURT: Got it.

3 MR. DAHAN: Thank you, your Honor.

4 (Plaintiff's Exhibits 251, 457, 756, 655, 256, 257,
5 316, 312, 314, 299, 313, 481, 359, 650, 651, 656, 458, 641, and
6 641A received in evidence)

7 (Defendant's Exhibits 2, 1028, 1028A, 541, 998, 395,
8 395A, and 539 received in evidence)

9 THE COURT: OK. Mr. Brown.

10 MR. BROWN: Thank you, your Honor.

11 REDIRECT EXAMINATION

12 BY MR. BROWN:

13 Q. Good afternoon, Mr. Kroeker.

14 A. Good afternoon.

15 Q. I want to start with one of the documents Mr. Dahan focused
16 your attention on earlier, which is PX 756. And you'll recall,
17 I take it, that this is a document we spent some time on, which
18 is Spark Energy's Inc.'s report to the SEC and to its public
19 shareholders about the dropdown transaction.

20 A. Yes.

21 Q. And Mr. Dahan asked you various questions about certain
22 parts of this, and certain other parts he didn't ask about, so
23 I'd like to focus your attention on a few of the parts he
24 didn't ask about.

25 If we turn to page 3, which is the front page of the

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1 document.

2 MR. BROWN: And you can below the whole thing up.
3 Thank you.

4 Q. Mr. Dahan asked you some questions about the top of this.
5 When you go down, under the number 1 on this page --

6 THE COURT: Is it showing up on your screens?

7 MR. BROWN: It's on our screens, your Honor.

8 THE COURT: I'm having a little technical problem.

9 MR. BROWN: Yes, I know what problem. Off the record
10 perhaps.

11 (Discussion held off the record)

12 THE COURT: Go ahead. Back on the record.

13 Q. So, again, we're referencing Plaintiff's Exhibit 756. And
14 on page 3, do you see that you, as president, CEO of Spark
15 Energy Inc. are reporting to the shareholders in that first
16 sentence that the dropdown MIPA was actually signed several
17 months earlier on May 3rd, correct?

18 A. Correct.

19 Q. And is it fair to say you're also identifying publicly that
20 Spark HoldCo was the acquirer of the business?

21 MR. DAHAN: Objection, your Honor. Misstates what is
22 said in the first sentence. It says "the company and Spark
23 HoldCo."

24 THE COURT: Yes. Spark HoldCo was the acquiring name.

25 Q. And then it actually attaches, as an annex, if we jump

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Kroeker - Redirect

1 forward to 225 of the document, the actual MIPA itself.

2 Correct?

3 A. Yes.

4 Q. And then, if we turn forward in the actual MIPA that was
5 attached to the file in annex A and we turn to page 316, we see
6 the signature page of the MIPA. Correct?

7 A. Yes.

8 Q. And who is identified as the seller?

9 A. National Gas & Electric, LLC.

10 Q. And who is identified as the buyer?

11 A. Spark HoldCo, LLC.

12 Q. And is that you who signed as Spark HoldCo, LLC's chief
13 executive officer?

14 A. Yes.

15 Q. And you sign as Spark HoldCo's chief executive officer but
16 also as the managing member of Spark HoldCo, which is a
17 publicly traded company, SEI, correct?

18 A. Correct.

19 Q. And then if we scroll down, this also identifies on the
20 right side the role being played by SEI in connection with the
21 following MIPA, correct?

22 A. Yes.

23 Q. And would you read above "Spark Energy, Inc." what it says
24 that Spark Energy, Inc. is.

25 A. As?

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Kroeker - Redirect

1 Q. In relation to the MIPA. What is Spark Energy signing as?
2 You can read starting with "as signatory."

3 A. So you just wanted the right-hand side. "As signatory for
4 the limited purposes of agreeing to issue the shares and to
5 grant registration rights as set forth in Section 8.2(c) and
6 Section 2.2(c), if applicable, and agreeing to issue the SEI
7 guaranty pursuant to Section 7.17."

8 Q. And as the CEO of Spark HoldCo at the time as well as the
9 CEO of Spark Energy at the time, did you believe this to be a
10 true statement to the public as reflected in the signature page
11 of the MIPA signed on May 3rd?

12 A. Yes.

13 Q. Let's jump to another document Mr. Dahan spent some time
14 on, DX 1028. This was the document that attached to it, at
15 1028A, the -- if we jump ahead, James, to A, the attachment.

16 So you recall Mr. Dahan asking you some questions
17 about the Spark Energy Major Energy due diligence overview that
18 Mr. Gregory sent to you on April 22, 2016. Do you recall those
19 questions?

20 A. Yes.

21 Q. And if we turn to slide 3, which is the slide that
22 Mr. Dahan spent some time with you on, I have some other
23 questions.

24 So with respect, first, to the three-year projections
25 that Mr. Dahan asked you about, I take it, sir, it's fair to

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Kroeker - Redirect

1 say that the projections as of April 2016 were all predicated
2 on the projections that Major Energy sellers provided NGE?

3 MR. DAHAN: Objection to form, your Honor.

4 THE COURT: What was the objection?

5 MR. DAHAN: First of all it's leading, and second of
6 all he has no foundation for that yet. So he should be asking
7 what were they based upon?

8 THE COURT: Well, you can set a foundation if you'd
9 like.

10 MR. BROWN: Sure.

11 Q. Mr. Kroeker, the transaction between NGE and the sellers
12 closed on April 15, 2016, correct?

13 A. Correct.

14 Q. Seven days later, you received this from Mr. Gregory,
15 correct?

16 A. Correct.

17 Q. So seven days of performance by Major had occurred between
18 the closing of the MIPA between NGE and sellers and these
19 three-year projections that looked out to the end of 2018,
20 correct?

21 A. That's correct.

22 Q. So could you tell the Court on what these projections were
23 based?

24 A. These projections were based on inputs that were provided
25 by NG&E in consultation with employees of Major.

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Kroeker - Redirect

1 Q. And did you have an understanding of where --

2 MR. BROWN: Should we stop, your Honor?

3 THE COURT: Yes. Let's take a break.

4 Off the record.

5 (Discussion held off the record)

6 (Pause)

7 THE COURT: All right. Back on the record.

8 Mr. Brown?

9 MR. BROWN: Thank you, your Honor.

10 BY MR. BROWN:

11 Q. And so I believe, having set the foundation, Mr. Kroeker,
12 do you have an understanding that NGE's inputs that you made
13 reference to before we took our short break were predicated on
14 the projections that were provided to them by the sellers
15 looking forward to the three years during the earnout period
16 from the end of 2016 to the end of 2018?

17 A. Yes.

18 Q. And I take it, just to make sure the record is clear, that
19 was your understanding at the time you were reviewing this
20 document in April of 2016, correct?

21 A. That's correct.

22 Q. So one line that we only briefly touched on during
23 Mr. Dahan's examination was the "cost to acquire" line. Do you
24 see that line there?

25 A. Yes.

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Kroeker - Redirect

1 Q. Can you first just describe for the Court what is meant by
2 that line. What is meant by "cost to acquire"?

3 A. Well, you generally spend money in two different ways when
4 you're acquiring customers. You spend money in the form of
5 residual commission payments, which would flow through the G&A
6 line. That's typically on the commercial accounts. And when
7 you acquire residential customers, you pay up front commissions
8 to either door-to-door vendors or telemarketing vendors. Those
9 up-front commissions get capitalized for accounting purposes,
10 get tracked on a separate line for financial reporting
11 purposes, and so this line, "cost to acquire," would have been
12 up-front commissions paid for door-to-door and telemarketing
13 sales channels.

14 Q. And you understood, again, that these were the three-year
15 projections, the cost to acquire customers, that sellers were
16 providing to NGE prior to closing on the MIPA.

17 A. I think the actual projections that were provided to NG&E
18 before the NG&E deal closed actually had an elevated level of
19 cost to acquire. These would have been the numbers that would
20 have been current as of April 22nd based on conversations
21 between the Major management team and the NG&E management team.

22 Q. Understood. So now could you describe for the Court a
23 little bit about the difference between Spark's experience in
24 cost to acquire customers and what you would observe Major's
25 cost to acquire customers were as we proceeded through the

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Kroeker - Redirect

1 earning period.

2 A. Yes. So what we saw going forward is that Spark, you know,
3 having made some changes with the way we managed our vendors
4 over time, we were getting larger customers at a lower price
5 than what Major was getting, during the earnout period,
6 speaking specifically about residential.

7 Q. And from the standpoint of cost to acquire and RCEs and the
8 use of brokers or vendors versus not, can you describe the
9 difference you were observing between the way Spark
10 historically had RCE counts versus costs relative to the way
11 Major had RCEs compared to costs. Do you understand the
12 question?

13 A. I think so. So Spark historically has been focused on cost
14 to acquire per RCE, which is a volumetric measure, which is a
15 measure that we report on externally. Major has historically
16 been focused on cost to acquire a customer. And so when you
17 compare -- and I did this with Dan in 2017 -- when you compared
18 the cost to acquire per customer, between Spark and Major, they
19 were actually fairly similar. When you took that over to be
20 the cost to acquire per RCE, which is now a volumetric measure,
21 Spark was significantly more efficient in acquiring residential
22 volumes, or RCEs, than Major was.

23 Q. And can you unpack for the Court a little bit, from your
24 perspective as the CEO of Spark HoldCo, why it was there was
25 such a difference between Spark and Major in respect of that.

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Kroeker - Redirect

1 A. So one of the things that we did very distinctively in '15,
2 '16 time frame was go to all of our major -- all of our
3 significant vendors and introduce volumetric thresholds into
4 the commission accounting structure. So if customers were
5 below a certain size, we didn't pay them at all. If they were
6 between another range of size, they would get a reduced
7 commission and they would get an incentivized commission if
8 they were above a certain size. So trying to drive our vendors
9 to go into higher-value neighborhoods, to make it real simple,
10 which our larger customers consumed more energy and therefore
11 were more valuable to us. Major was just paying on a per-meter
12 or per-customer basis at this time.

13 Q. I want to talk for a second about what Major --

14 A. Sorry. Can I finish that thought real quick.

15 When you pay per meter and per account, door-to-door
16 agents naturally go to low-income neighborhoods where you have
17 low usage and just maximize the number of meters that you can
18 sign up, because it's a lot quicker to go in neighborhoods
19 where the homes are close together.

20 Q. So let's talk about one of Major's brokers. Do you know
21 who PTM is?

22 A. Yes.

23 Q. Who is PTM?

24 A. PTM was a significant vendor for Major at this time. I
25 don't remember what it stands for, but the principal behind it

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Kroeker - Redirect

1 was a gentleman named Sunil.

2 THE COURT: How do you spell Sunil?

3 THE WITNESS: S-u-n-i-l.

4 THE COURT: Thank you.

5 THE WITNESS: His last name starts with a G.

6 Q. And you understand that Sunil has submitted a witness
7 statement and is intending to appear on plaintiff's behalf in
8 this case?

9 A. I'm aware of that.

10 Q. Have you had a chance to review -- strike that.

11 With respect to PTM, do you know off the top of your
12 head -- and I, in part, don't want to ask this question -- do
13 you know off the top of your head how much approximately Major
14 paid PTM over the course of the earning period?

15 A. I don't. I know at the peak it was in hundreds of
16 thousands of dollars a month.

17 Q. Does approximately \$9 million for a portion of the earnout
18 period sound right to you?

19 A. Yes.

20 MR. DAHAN: Objection to form, lack of evidence for
21 that, your Honor.

22 MR. BROWN: OK. Can we pull up DX 944A.

23 MR. DAHAN: And also for the record, it is beyond the
24 scope. This was not covered. And this is a redirect. It's
25 not his direct.

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Kroeker - Redirect

1 THE COURT: Understood. I'm going to give a little
2 bit of leeway, as I did yesterday.

3 MR. BROWN: And just if I might create a quick record
4 on that issue, your Honor. Mr. Dahan asked questions about the
5 import of the relationship between brokers and vendors, and
6 it's a 2.7 issue, and now I'm exploring one of the largest
7 vendors, the amount spent.

8 MR. DAHAN: I didn't cover 2.7 with him, but --

9 THE COURT: It's OK.

10 944A?

11 MR. BROWN: 944A.

12 Q. And this is a really lengthy spreadsheet, Mr. Kroeker, but
13 I'll represent for the Court and for Mr. Dahan that if you add
14 up the columns B218 through AC218, which is the payments made
15 from Major to PTM between November 2016 and December 2018, it
16 equals \$15,000 less than \$9 million. Does that surprise you
17 based on your testimony about what you understood they were
18 paying?

19 A. Does not surprise me.

20 THE COURT: This is what major paid to PTM, total?

21 MR. BROWN: Correct.

22 Now, that's between November 2016 and December 2018,
23 so that does not include the April through October 2016 portion
24 of the earnout.

25 Q. And, Mr. Kroeker, I recognize you didn't know off the top

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Kroeker - Redirect

1 of your head it's a \$9 million number, but as the earnout
2 period was progressing, what was your reaction from the
3 standpoint of the buyer, Spark HoldCo, under the MIPA dropdown,
4 to the amount of money that sellers were paying to PTM?

5 A. We were paying them an extreme amount of money. I had
6 conversations with Dan in 2017 --

7 Q. And again, for the record, when you say Dan, you're
8 referring to Mr. Alper.

9 A. Mr. Alper, the CEO.

10 So Dan and I spoke on a weekly basis. He would
11 provide updates for me on how the business is going. And one
12 of those updates, or one of the items that he provided updates
13 on was the amount of money being spent on residential customer
14 acquisitions. And so that triggered conversations between he
15 and I on the efficiency of that cost-to-acquire spend,
16 specifically on how much we were paying per customer. I was
17 always encouraging him to add as many customers as possible,
18 encouraging him to add larger customers whenever possible, but
19 shared information with him on ways to maybe be more efficient
20 with that spend, given it's a, you know, several-million-
21 dollar-a-year line item in Major's financials.

22 Q. And I take it the fact that the spend continued through the
23 end of the earnout period leads us to conclude that they didn't
24 stop Mr. Alper from continuing to PTM?

25 A. Did not stop him from continuing with PTM.

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1 Q. You gave him your observations about deficiencies and
2 Mr. Alper continued to do as CEO until he was fired what he
3 wanted to do; is that correct?

4 A. Yes. I think that Dan, Mr. Alper, did not appear to change
5 the commission structure with PTM or with any vendors based on
6 that conversation, that I noticed.

7 Q. Let's turn to DX 541, which is the Houlihan Lokey valuation
8 that Mr. Dahan asked you some questions about.

9 A. OK.

10 Q. Now, we see, and we know that the Houlihan Lokey valuation
11 is performed later in time, an evaluation of the acquisition of
12 Major and the interest as of the date of the closing of the
13 first MIPA, correct?

14 A. Correct.

15 Q. And similar to the questions that we went through on the
16 April three-year projection document we looked at moments ago,
17 is it your understanding, one way or the other, that Houlihan
18 Lokey's valuation, looking at April 15th, is predicated on the
19 projections provided by the sellers to NGE?

20 A. Yes, because they would have had to do this with
21 information that would have been available as of April 15,
22 2016.

23 Q. And I take it it's fair to state the obvious, that if the
24 projections provided by sellers are incorrect, so would be the
25 valuation?

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1 A. Yes.

2 Q. Let's turn to another document Mr. Dahan spent some time
3 with you on, which is one of the many earnings call
4 transcripts, PX 256. You recall Mr. Dahan had some questions
5 about this document, which is the earnings call transcripts for
6 quarter 2, 2016?

7 A. Yes.

8 Q. And this is on August 11, 2016, so it's several months
9 after the dropdown is signed. Correct?

10 A. Yes.

11 Q. And it's recording out, just to mental set again, I think
12 this is clear in the record, but these earnings call are for
13 the entire Spark family of companies, of which Major is one
14 part. Is that fair?

15 A. For all of Spark Energy, Inc. and its subsidiaries.

16 Q. So you're reporting to the public on the entirety of the
17 family of companies which, after the transaction with Major
18 Energy and the dropdown, includes Major as one of many
19 subsidiaries. Fair?

20 A. Yes.

21 Q. And so in this transcript, as of August 11, 2016, when
22 you're talking to the market about Spark's overall performance,
23 I take it, like any CEO of a publicly traded company, you're
24 doing two things. One, you're talking about actual financials
25 for the prior quarter.

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1 A. Correct.

2 Q. And then you're making forward-looking statements to the
3 market about what might or might not happen in the future based
4 on your estimations. Is that fair?

5 A. Yes.

6 Q. And what Mr. Dahan was asked you about were both the prior
7 and the future-looking issues in these transcripts; is that
8 correct?

9 A. I believe so, yes.

10 Q. As of this point in time, August 11, 2016, you were only
11 aware of Major's actual performance for April, May, and June,
12 the second quarter of 2016. Is that fair?

13 A. Yes.

14 Q. So you had only seen, at the time of talking about Major,
15 those three months of actual --

16 A. I would have seen financial information as part of the due
17 diligence exercise, but in terms of what was going to be
18 included in our financials, it would have only been from April
19 of '16 forward.

20 Q. Correct. And I'm only talking about -- so this earnings
21 call is to tell the market about Spark's overall second quarter
22 2016 performance, which would include, as you are recording
23 generally, Major's performance in April, May, and June, part of
24 which is post signing of the dropdown or closing.

25 A. I'm not sure. I know that ultimately we included April

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Kroeker - Redirect

1 through August financials, but I don't know that we included
2 that in the second quarter Q or did that come in the third
3 quarter Q.

4 Q. In any event, if you turn to page 5 of the earnings call
5 and you look at the fourth paragraph down -- Mr. Dahan went
6 over some of this with you. Do you recall him asking you?

7 A. Yes.

8 Q. And you're making reference in here to the May 3rd dropdown
9 transaction that was signed but which didn't close until the
10 end of August. Correct?

11 A. Yes.

12 Q. And that's the dropdown signing, if we pull up, James, DX
13 1021, so the signing occurs on May 3rd. And I think we've seen
14 this document before. The day after the signing, which is
15 months before this earnings call, Major Energy itself is
16 announcing the acquisition through the dropdown by Spark
17 HoldCo, correct?

18 A. Yes.

19 MR. DAHAN: Objection to form.

20 THE COURT: Noted. I understand.

21 MR. DAHAN: Thank you.

22 Q. And I won't go through Mr. Alper's comments because we've
23 seen it before, so you can move on from that.

24 So if we go back to the Q and A on page 9 -- oh, I'm
25 sorry. We're back to PX 256. Page 9, Mr. Dahan asked you some

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1 questions about questions and answers you were providing, many
2 of which were from response to FBR Capital, Mr. Driscoll, and
3 he focused your attention in your answer at the top of page 9
4 to one of Mr. Driscoll's questions. But he only focused you on
5 the first sentence of that paragraph. So after we get to that
6 first sentence that he focused you on, will you read in what
7 you then said to the market through about line 6.

8 A. "And if you look at the timing of the Major transaction and
9 how that New York issue played out, that was why it was
10 structured the way it was. It was to protect us on the
11 downside in the event that the New York order had a material
12 impact on the business. If you look at what's really going on
13 in New York, I mean, in late July, the court issued an order
14 that vacated the first three clauses of that order. We see
15 that as a huge win both for Spark and for the industry."

16 Q. And then you go on to say you don't think the issue is dead
17 and there's uncertainties out there.

18 A. Correct.

19 Q. So Mr. Dahan asked you a couple, I would say probably
20 several or a few questions about the New York resetting order,
21 the New York low-income order, when they were issued, when they
22 were vacated, things of that sort. Do you recall those
23 questions?

24 A. Yes.

25 Q. And you were trying to give an answer, I believe, about the

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1 distinction between planning for the impact of potential
2 regulatory action in New York and what in retrospect, looking
3 here today at trial, actually happened. So for the former part
4 of that, can you describe for the Court what Major and other --
5 let's start with Major -- what Major was doing from your
6 perspective to adjust its business in the event things went
7 poorer than --

8 MR. DAHAN: Objection, your Honor.

9 A. So I can speak for Major and I can speak -- sorry.

10 THE COURT: What's the objection?

11 MR. DAHAN: What's the foundation?

12 THE COURT: Can you describe for the Court what Major
13 was doing from your perspective to adjust its business in the
14 event things went --

15 MR. DAHAN: When? When?

16 THE COURT: What period?

17 Q. Well, let's start with -- Mr. Dahan was asking you about
18 what you were trying to market on August 11, 2016. So from
19 August 11, 2016 let's start. What was your perspective as of
20 that period of time about what Major was doing to adjust its
21 business to plan for what could be the downside associated with
22 both the resetting order in New York and the low-income order?

23 A. OK. So I believe there's two things in 2016. The first
24 one was, Major had a significant percentage of their customers
25 that were on variable month-to-month contracts in New York.

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1 Variable month-to-month contracts tend to be more valuable.
2 They tend to have higher unit margins. And there's more
3 flexibility in pricing. Major took a step to lock in those
4 customers' contracts. And I'm being careful with my word
5 choice because they didn't actually get affirmative consent
6 from those customers to renew them onto two-year fixed price
7 contracts. What they did was sent communications to those
8 customers, as I understand it, saying, your price will not
9 exceed X for the next 24 months. And so in doing that took
10 away a lot of the pricing flexibility of the business, but did
11 that in anticipation of this resetting order or similar order
12 or modified order going into effect, so that they would be able
13 to argue that these customers, with these 24-month price
14 commitments, were in effect fixed-price contracts and therefore
15 did not have to be turned over to the utility.

16 And so that was one of the significant ones that they
17 did. I believe they did that both for the low-income
18 customers, as well as the non-low-income customers.

19 The second thing that was going on, as I understand
20 it, was increasing their focus on commercial accounts as
21 opposed to residential accounts. And commercial accounts tend
22 to have lower unit margins than residential customers do. But
23 Major was showing the business to be more focused on
24 commercial, and we did see some data on that this morning.

25 Q. And you as the CEO of Spark HoldCo, the buyer through the

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1 MIPA through August 23, 2016 through the end of the earnout
2 period on December 31, 2018, were getting weekly reports from
3 Mr. Alper, at least until he was terminated, about the
4 performance of Major?

5 A. Yes. And then Mr. Wiederman continued that practice after
6 Mr. Alper was gone.

7 Q. Right. And we'll talk about Mr. Alper being fired in a few
8 moments. But you got things from Mr. Alper until he was
9 terminated and from Mr. Wiederman until the end of the earnout
10 period. Is that fair?

11 A. Yes.

12 Q. And so you were seeing, as the CEO of Spark HoldCo, how
13 Major was performing on both monthly, weekly, and quarterly
14 basis throughout the earnout period after the dropdown closes.
15 Is that right?

16 A. Yes.

17 Q. Can we turn to the next transcript, PX 257, that Mr. Dahan
18 asked you some questions about. So now this one is November
19 10, 2016. So at that point, we have six months of actuals for
20 Major Energy, quarter two and quarter three, correct?

21 A. Yes.

22 Q. And this is now six weeks after the dropdown transaction
23 closed?

24 A. Yes.

25 Q. And Mr. Dahan asked you a couple questions on some of these

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1 pages, but I want to direct your attention to page 7, where
2 you're answering a list of questions. And Mr. Dahan asked you
3 some questions about this, but if we look at the sentence
4 towards the bottom, James, that starts with "so very, very
5 pleased with the two businesses." You've talked about the two
6 acquisitions, Provider and Major, and you say essentially
7 you're very pleased with those two businesses as of this point
8 in time. Correct?

9 A. Yes.

10 Q. Was that a truthful statement?

11 A. Yes.

12 Q. Why was it that, as of November of 2016, looking at quarter
13 two, quarter three, you were pleased with Major.

14 A. Yes. I think Major was a good business that we acquired.
15 We wouldn't have bought them if we didn't think they were a
16 good business. They had good strong unit margins. Their
17 volumes were below what we had anticipated. I was hoping we
18 could work together to increase the volumes over the next
19 couple of years. But when you take the Provider acquisition
20 and the Major acquisition as of November 2016, I think these
21 were very good businesses that we were excited about and we had
22 high expectations for going forward.

23 Q. Do you recall, as of November -- as of this earnings call,
24 November 10, 2016 -- this is about six weeks after Major Energy
25 has given notice of intent to terminate the PSE contract as of

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1 March 2017?

2 A. Yes, that's correct.

3 Q. When you were talking to the market in these Q2 and Q3 2016
4 earnings transcripts, as it relates to New York, you're talking
5 about the impact, I take it, of New York regulatory decisions
6 on all of Spark's companies, not just on Major.

7 A. All of Spark's companies, correct.

8 Q. And do you recall at the time, in let's call it Q2 2016,
9 how large a part of Spark family of companies overall New York
10 business was represented by Major?

11 A. I don't recall that. I believe what we disclosed to the
12 market at that time was that -- let me rephrase.

13 I think we disclosed to the market in total what the
14 New York business represented. I don't think we ever disclosed
15 to the market what the Major component of that was.

16 Q. Do you recall the Major component of that being
17 approximately a third?

18 MR. DAHAN: Objection.

19 A. Sorry, a third of?

20 THE COURT: Sustained.

21 Q. So sitting here today, Mr. Kroeker, you don't recall back
22 in 2016 what portion of Spark's overall New York business was
23 represented by Major; is that right?

24 A. No. I had eight different companies activated in New York.
25 Major would have been one of those eight.

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1 Q. Let's move to PX 312, which is the earnings call transcript
2 from August 4, 2017. You recall there were some questions from
3 Mr. Dahan about this document, Mr. Kroeker?

4 A. Yes.

5 Q. If you turn to page 8, there's a Q and A, and, again, you
6 answer Mr. Driscoll. Mr. Dahan asked you about some portion of
7 this and not others. Again, this is August 4, 2017. So it's
8 reporting on Q2 2017. We're now five quarters into the 11
9 quarters of the earnout period. Fair?

10 A. Correct.

11 Q. And Mr. Dahan focused on the top part. You were also
12 telling the market at the bottom, to short-cite this, that,
13 quote, it's too early for us to know what those rule changes
14 are going to be. I'm anticipating they're going to be things
15 that we've seen before in other markets in which we operate.
16 And I'm anticipating it's going to require us to either change
17 some of our sales practices, our disclosures, maybe our product
18 suite. But ultimately I think we end up with a healthy
19 business in New York going forward longterm." And then you
20 advise, "It's going to be well into the third quarter, maybe
21 the fourth quarter, as late as the first part of 2018."

22 Correct?

23 A. Yes.

24 Q. And did you believe that also to be true in the follow-up
25 statement at the time?

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1 A. Yes.

2 Q. With respect to the questions Mr. Dahan asked you about the
3 impact about, let's talk about the low-income order, do you
4 have a general understanding, sitting here without being
5 refreshed, how many customers Major believed that it lost as a
6 result of the low-income order?

7 A. The most recent number that I've seen is around 10,000
8 customers.

9 Q. So let's look at one of the documents that talks about
10 this, which is DX 866, and then as an attachment 866A. But 866
11 is Mr. Taub, the chief technology officer at Major. It's
12 Mr. Taub and Mr. Horowitz having an exchange about low-income
13 drops. And this is in March of 2019. So it's looking back,
14 and this is after the earnout period has completed, correct?

15 A. Yes.

16 Q. And if you scroll up to the top, James, Mr. Horowitz is
17 then forwarding that from Major Energy to his Gmail -- this is
18 in 2019, well into this litigation. You see that?

19 A. Yes.

20 Q. And the attachment is A. James, if you could pull that up.
21 And so what Mr. Taub was sending Mr. Horowitz -- you can back
22 it out so they see the whole thing. Thank you. So if you just
23 add the accounts dropped that Mr. Taub and Mr. Horowitz were
24 discussing just from October 2017 through the end of the
25 earnout period in 12/28, you get -- and again I'll represent to

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1 the Court I've done the math -- 6,931 customer accounts dropped
2 in just that period that Mr. Horowitz called low-income drops.
3 Without doubting my numbers, have you seen this document before
4 and does that look familiar to you?

5 A. I have not seen this document before, or at least not that
6 I recall. The 10,000 that I'm referencing was the calculation
7 that I did with Wiederman and Moeller, presumably, about a
8 year, a year prior to this. I mean, it was something we had
9 regular discussions on in trying to quantify what's the impact
10 to Major, what's the impact to Spark. There were conversations
11 and data dumps at that time, and that's how we got to the
12 10,000 customer impact.

13 Q. But you'd never seen, before I just showed it to you,
14 Mr. Horowitz and Mr. Taub's exchange calculating 7,000 accounts
15 dropped just in those 15 months between October and --

16 A. Not that I recall, no.

17 Q. Let's go to PX 481. So this is another document that --

18 MR. BROWN: You don't have to blow it up.

19 Q. This is another document Mr. Dahan showed you. And if we
20 jump forward to page 14, it's the November 2014 management
21 presentation that Major provided to Spark Energy back when it
22 was exploring a possible acquisition by Spark. Do you recall
23 those questions?

24 A. That's correct, yes?

25 Q. And Mr. Dahan focused you on certain parts of this,

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1 including regulatory risks and financial projections. Do you
2 recall those questions?

3 A. Yes.

4 Q. All of these, all of the statements in this management
5 presentation, I take it you understood were representations
6 that Major Energy was making to Spark at the time about how
7 Major Energy wanted to present itself.

8 A. Yes.

9 Q. You didn't, I take it at the time, you took -- strike that.

10 Did you take these as being truthful statements?

11 A. Yes. I would have taken this as a management presentation
12 that would have been subject to due diligence before
13 consummating a transaction.

14 Q. I take it it's fair to say by accepting receipt of this
15 November 2014 presentation from Major you weren't validating or
16 accepting that all of Major's projections were true?

17 A. No. Again, this was the start of a deal process, and this
18 was before we would have done any due diligence.

19 And it's very common in management presentations to
20 have what we call a sell-side view to the projections and then
21 for the buyer to make modifications to those projections and
22 base our valuation based on the buy-side projections.

23 Q. Let's also talk about something else you saw back in this
24 time frame. Can we look at DX 70.

25 So DX 70 is an e-mail exchange -- can we jump out to

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1 the full document, James. This is an e-mail from -- an e-mail
2 thread, that starts with Ms. Hodges, who, back in February
3 2015, is the chief -- who is the CFO of Spark Energy at the
4 time, correct?

5 A. Yes.

6 Q. And you see that she is writing back -- she writes to Cliff
7 Adams at Coady Diemar, who is ultimately the investment banker
8 who worked with Major on the sale to NGE, correct?

9 A. Yes.

10 Q. And were you familiar with these discussions at the time?
11 I think Mr. Dahan talked with you about the early 2015 possible
12 acquisition of Major by Spark.

13 A. Yes.

14 Q. And do you see Ms. Hodges is talking to Mr. Adams about
15 that possible acquisition, and she says, "Hi Cliff, I circled
16 up with my folks this afternoon for an update. We are still
17 interested in pursuing a transaction pending our feasibility
18 analysis on this 'dropdown' structure that we spoke of." Do
19 you see that?

20 A. Yes.

21 Q. And then do you see that Mr. Adams sends that along with an
22 FYI to Mr. Horowitz and Mr. Wiederman. Do you see that?

23 A. Yes.

24 Q. And Mr. Horowitz responds, "Wow. Surprisingly positive."

25 Do you see that?

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1 A. Yes.

2 Q. You were, I take it, having discussions with Ms. Hodges as
3 your CFO at the time in late February 2015. Is that fair?

4 A. Yes.

5 Q. And do you have an understanding of the dropdown
6 transaction --

7 A. Yes.

8 Q. -- that she was discussing with Mr. Adams, Mr. Horowitz,
9 and Mr. Wiederman at that time?

10 A. Yes.

11 Q. What do you understand it to be?

12 A. So we had gone to the equity markets prior to this on
13 another acquisition and, in going to issue equity, saw our
14 stock price drop significantly, so realized we were not going
15 to be able to go to the equity markets to finance this deal.
16 An alternative structure was for us to issue equity to NG&E or
17 RetailCo, one of Keith Maxwell's other companies, and have NG&E
18 buy Major, turn around, do the back-to-back dropdown that we
19 spoke of, but that would give us the ability to buy Major using
20 equity as opposed to cash.

21 And so essentially using NG&E's for bridge financing,
22 which she's referring to here as a quote/unquote dropdown
23 structure.

24 Q. So is it fair to, for the sake of time and efficiency, just
25 say, to summarize that, you were discussing with the sellers,

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1 back in February of 2015, the concept of an acquisition with
2 back-to-back MIPAs and a dropdown transaction?

3 A. Yes.

4 Q. Without going back to the document -- I don't think we'll
5 need it -- but Mr. Dahan asked you some questions about the
6 Illinois regulatory action that was referenced in the January
7 2016 presentation. Do you recall those questions?

8 A. I do.

9 Q. And he was asking you about that one particular disclosed
10 issue from January. You started to answer a question about a
11 later Illinois issue. But I don't think Mr. Dahan talked about
12 that.

13 A. Correct.

14 MR. DAHAN: Objection, your Honor, misleading. He
15 just didn't know it was in -- I asked him if it was in March
16 2018.

17 MR. BROWN: I'll rephrase.

18 Q. You're familiar with a second attorney general Illinois
19 action that's been impacting Major Energy, correct?

20 A. Yes.

21 Q. Will you describe for the Court what you understand is the
22 second Illinois attorney general action that is impacting
23 Major.

24 A. So the second action in Illinois was the AG matter, which
25 we ultimately got settled, after several years of going back

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1 and forth with the AG. The settlement involves paying \$2
2 million and basically having to stop any and all sales and
3 marketing activities in Illinois under the Major Energy entity.

4 Q. And from your perspective as CEO of Spark HoldCo, have you
5 seen an impact that the Illinois AG action and resolution had
6 on the Major Energy business?

7 A. Absolutely. If you go look at the projections that
8 underpin the EBITDA targets in the MIPA, Illinois was a
9 significant -- Illinois was the largest growth assumption in
10 those projections that underpin the 20.7, 25 million to 27.8
11 million. Shortly into that earnout period, Major was precluded
12 from doing any sales and marketing activity in Illinois. And
13 so the biggest piece of the growth wedge, if you will, changed
14 dramatically at that point in time.

15 Q. And do you have an understanding that Spark is involved in
16 litigation as a plaintiff in this court before a different
17 judge against the sellers of Major Energy --

18 A. Yes, I am aware of it.

19 Q. Let me just finish the question so we have a clear record.

20 -- in connection with indemnification claims over
21 losses suffered in connection with the Illinois AG action?

22 A. Yes.

23 Q. With respect to the 2015 possible acquisition by Spark of
24 Major Energy, that eventually didn't go forward --

25 A. Correct.

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1 Q. -- since we're all here. And that related -- the reason it
2 didn't go forward relates to a Pennsylvania issue. Is that
3 fair?

4 A. That's my understanding, yes.

5 Q. And could you describe for the Court what was the
6 Pennsylvania issue that led to the acquisition not going
7 forward.

8 A. As you saw in the November 2014 management presentation,
9 there were a number of regulatory issues that were disclosed at
10 that time. As part of our due diligence, we had looked at each
11 of those matters. We had determined that we could get
12 comfortable with proper escrows and protections in a purchase
13 agreement. We had completed our due diligence. We had
14 negotiated a purchase agreement. The sellers were in Houston
15 for a meeting in the early part of 2015. What I recall is that
16 deal was substantially complete, meaning the MIPA was
17 negotiated, the terms were negotiated, the earnout was
18 negotiated, but had not yet been consummated. The sellers left
19 Houston, went back to New York. And the next day we got a
20 phone call from Cliff at Coady Diemar. He called Georganne
21 Hodges and said that when the sellers returned to New York,
22 there was a letter on their desk. And I don't know if that was
23 literal or figurative, but what he said was there was a letter
24 on their desk when they arrived back in New York from the
25 Pennsylvania commission and they had a significant regulatory

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1 matter, that it had a headline number of \$15 million on it and
2 was going to require some changes to the business, and his
3 words were, as I heard it, was, "So I assume the deal is off."
4 And, you know, we agreed; that was a significant matter.
5 Unless the sellers were willing to put up an additional \$15
6 million of protection in an escrow, which they were not willing
7 to do, that deal was off, or certainly on hold until those
8 regulatory matters got sorted out.

9 It's those same regulatory matters that ultimately
10 ended up in a 3.8 or 3.9 million dollar item in the litigation
11 credit, in the deal that NG&E did.

12 Q. If we turn just for a moment -- there is a housekeeping
13 issue, but I don't think you and Mr. Dahan had completed your
14 discussion on this. Could you turn to DX 2, which is the NGE
15 MIPA with sellers. You made a reference to the earnout
16 agreement being incorporated by reference in the MIPA. Do you
17 recall that?

18 A. Yes.

19 Q. Just to make sure we're all on the same page, if we turn to
20 page 19 of the MIPA, Section 1.2(a)(ii), so we see the exhibits
21 and schedules annexed hereto and referred to herein are hereby
22 incorporated and made a part hereof and set forth in full
23 herein and are considered to be an integral part of this
24 agreement." Do you see that?

25 A. I do.

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1 Q. And if you turn to the table 2, the end of the table of
2 contents, it lists all the exhibits and schedules that are
3 incorporated expressly by reference, and Exhibit A is the
4 escrow agreement, Exhibit B is the earnout agreement. Do you
5 see that?

6 A. Yes.

7 Q. Is that what you were referring to earlier?

8 A. Yes.

9 Q. And is that what you were referring to in your witness
10 statement?

11 A. Yes.

12 Q. Back to the PSE issue for a moment, could you explain to
13 the Court -- Mr. Dahan asked you some questions about PSE? And
14 intentions -- could you explain to the Court in your own words
15 what benefits Spark provided to Major when it took over for PSE
16 after the PSE contract expired in March 2017?

17 A. They --

18 THE COURT: First remind me just what PSE again is.

19 THE WITNESS: Pacific Summit. It's a subsidiary of a
20 large bank that provides credit support and sleeving services
21 to retail energy providers. And so they leveraged their large
22 balance sheet to retailers like Major. Major was paying them a
23 fee per megawatt hour or for a dekatherm of gas in order for
24 Pacific Summit to step in with their balance sheet and provide
25 the credit support, typically in the form of either cash

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1 postings or LC postings with ISOs and/or physical supply
2 counterparties.

3 It's a very common structure in this space, and a lot
4 of small retailers use this structure.

5 Spark does not have a sleeve structure like that.
6 Spark has a standalone.

7 MR. BROWN: Sleeve structure.

8 THE COURT: Explain to me what you mean by "credit
9 support" versus "sleeve structure."

10 THE WITNESS: OK. So I sort of use the terms
11 interchangeably and I apologize for that. "Sleeve" means that
12 the -- let's use Major Energy. Major Energy can still buy gas
13 or power from Shell or BP or EDF. But they sleeve that
14 transaction through Pacific Summit so that, when Shell is
15 looking for credit support, they're looking at Pacific Summit's
16 balance sheet, not Major Energy's balance sheet. OK. So
17 that's the sleeve component. Major Energy pays a fee for
18 Pacific Summit sleeving those transactions.

19 That's one form of credit support. The other form of
20 credit support is, Pacific Summit would actually post the LCs
21 with the ISOs -- and those are performance LCs -- to ensure
22 that Major Energy will in fact deliver electricity or gas, as
23 the case may be.

24 THE COURT: Thank you.

25 THE WITNESS: And again it's a very common structure.

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1 We have looked at dozens and dozens of retail energy
2 acquisition structures over the years, closed 15 of those. I
3 would say, of those, four or five had sleeve provider
4 mechanisms very similar to this. And we had previously done a
5 deal that had Pacific Summit as the sleeve provider, so we were
6 familiar with the people and the counterparties and the
7 structure, before we got into this.

8 When we acquire a retail energy company like Major, we
9 go and immediately look and see how much are they paying for
10 sleeving fees, or for credit support. And we know that we get
11 about 90 percent of that as a synergy as soon as we replace
12 that sleeve provider. And the reason is we have our own
13 balance sheet and our own credit support, and there is
14 virtually no incremental cost for us to take that over.

15 So unless there is some reason why we wouldn't do
16 that, as in this case, normally, we take out that sleeve
17 provider the day after closing.

18 Q. And the reason you didn't do that in this case is because
19 Major had --

20 THE COURT: Ask a non-leading question.

21 MR. DAHAN: Thank you, your Honor.

22 Q. Why didn't you do that in this case?

23 A. There was a significant -- as I recall, there was a
24 significant termination fee or novation fee on this one, and
25 there was an earnout, and Major management had expressed to us,

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1 or Major sellers -- I guess there is some overlap there -- that
2 they wanted to continue with Pacific Summit in place as the
3 sleeve provider. And so we honored that and said, fine, we'll
4 leave that in place, but, when it comes up for renewal in March
5 of '17, we'd like to explore taking that out because we know
6 there's 2 or 3 million dollars worth of synergies for other
7 shareholders by replacing that sleeve.

8 Q. And did you ultimately provide, "you" being Spark, did
9 Spark ultimately provide, in March 2017, better pricing to
10 Major than what they had?

11 A. We did. We essentially shared that benefit with the Major
12 sellers. And so when I say we would -- 2 to 3 million dollars
13 worth of synergies, that was off of the old sleeve price, which
14 I recall was a dollar a megawatt hour and 12 1/2 cents a
15 dekatherm. What we did -- and there was a lot of iterations,
16 but what we landed on was, our internal pricing was going to be
17 80 cents a megawatt hour and 12 1/2 cents a dekatherm. A
18 majority of this is around electricity. So we provided a
19 benefit on the electricity side.

20 So we dropped the price by 20 cents a megawatt hour,
21 which translates into half a million dollars over the remaining
22 term of the earnout. Spark's true cost would have maybe been
23 20 cents, so there's a benefit to Spark of that, but we shared
24 some of that benefit with Major at the same time.

25 Q. Thank you. Can we pull up DX 483. So DX 483 --

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1 A. Sorry. Counsel, I don't think I answered your full
2 question. You said what other benefits.

3 In terms of what we did day to day, who was doing the
4 scheduling, who was making the hedging decisions, who was
5 executing the trades, who was like the day-to-day operations of
6 that, we didn't change anything. We literally put Spark in
7 place of Pacific Summit. But in terms of any of the
8 operational activities around energy supply, we didn't change
9 any of that, just stepped in financially to their position.

10 Q. Thank you.

11 Do you recall receiving this February 8, 2017 e-mail
12 from Mr. Horowitz?

13 A. Yes, I did.

14 Q. And so Mr. Horowitz is writing to you on February 8, 2017,
15 to you, Mr. Wiederman, Mr. Alper, copying Mr. Moeller of Major,
16 and Mr. Leonard of Spark Energy, and he says, "Nathan: yes --
17 the PSE negotiations did not proceed the way we would have
18 wanted and we are in agreement to give Spark supply a try as
19 Major's supplier." See that?

20 A. Yes.

21 Q. And then he says, "We will also be looking at what else is
22 out there in the market but do not believe any other
23 arrangement could be in place by April 1." Do you see that?

24 A. Yes.

25 Q. And do you recall that the notice of intent to terminate

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1 PSE was sent in late September 2016?

2 A. Yes. It takes months to make a transition like this. So
3 even though we're sitting here on February the 8th -- and
4 that's the day that Horowitz sends this e-mail -- we're already
5 anticipating it, because if we're sitting here February the 8th
6 and we have to have somebody else in place by March 31st, we
7 need to be further along than, you know, struggling to find a
8 draft term sheet.

9 Q. Going back to PX 470, if you look at your top e-mail to
10 Mr. Alper on September 26, 2016 -- this is to Mr. Alper,
11 Mr. Leonard, copy to counsel and Mr. Moeller -- you were
12 talking about the notice of termination letters that Major was
13 going to sent to PSE the next day or two. Is that correct?

14 A. Yes.

15 Q. And you tell Mr. Alper, "Dan, as you and I discussed, it's
16 not practical to draft a term sheet at this stage." Stop
17 there. You were talking about a formal term sheet between
18 Spark and Major with the exact terms of pricing. Is that fair?

19 A. Correct.

20 Q. You say, "However, you have my assurance that Major Energy
21 will not be disadvantaged if we replace PSE with Spark's energy
22 supply function in 2017." Do you see that?

23 A. Yes.

24 Q. And then if we fast-forward to DX 607. DX 607 is your June
25 12, 2017 e-mail to Mr. Wiederman and Mr. Moeller. Do you see

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1 that?

2 A. Yes.

3 Q. And in line 1, the number 1, you are referring to fees that
4 Spark is going to be charging Major for energy and gas. Is
5 that correct?

6 A. Yes.

7 Q. Do you know why the fees for energy went from a dollar to
8 80 cents?

9 A. No. That's the concession we made at the time of
10 negotiating the pricing, if you will, on the new term sheet.

11 Q. And if we look at DX 981, this is a term sheet -- this is
12 an e-mail between Pacific Summit and forwarded to Mr. Wiederman
13 with respect to a term sheet being provided by PSE at the end
14 of January 2017, which is six weeks before the termination.
15 And if we forward that to the Bates number ending 58, what
16 energy fee was Pacific Summit offering to Major as of January
17 31, 2017?

18 A. 2.50 a megawatt hour and 15 cents a dekatherm, both of
19 which were higher than what Major was getting on their existing
20 deal.

21 So to me what Pacific Summit said is, we do not want
22 to do another sleeving deal with you guys. And I happen to
23 know, because we have dealt with Pacific Summit a lot in the
24 energy industry space, they made the strategic decision to get
25 out of the rep supply business. So this was, this, rather than

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1 just say, hey, we're not going to do it, they sent the term
2 sheet back that had these increased prices in it so that Major
3 would go somewhere else.

4 This term sheet, by the way, was never turned over to
5 us in the entire negotiation of a Spark internal term sheet.
6 This only came to light after the fact during discovery.

7 Q. So my next question was going to be, did you ever hear
8 directly from the sellers what exactly was the best offer, the
9 real best offer?

10 A. No. What they told us verbally in the conference room in
11 Houston was that it was going to be about a dollar. And rather
12 than argue about whether it was going to be slightly more than
13 a dollar or slightly less than a dollar, I said, fine, if you
14 think a dollar is where it's going to be, how about we go with
15 80 cents so we can move on to other issues.

16 Q. And their actual last best offer was 2:50.

17 A. Correct.

18 And I wasn't -- they were not constrained to using
19 Pacific Summit. I had given them free license to go look for
20 any other sleeve provider at this time.

21 Q. Let's transition to a different topic that Mr. Dahan
22 discussed with you in -- he asked a question about paragraph
23 132 of your witness statement. And he said here, in respect --
24 he asked a question about -- he referenced Spark's allocation
25 of approximately 4 million and said you don't cite any evidence

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1 specifically in a written statement. Do you recall that
2 question?

3 A. Yes.

4 Q. And I know your witness statement is 300 paragraphs' long.
5 I'd like to show you DX 923A. Generally speaking, do you
6 recognize what DX 923A is?

7 A. Can you scroll down a little bit.

8 Q. Do you build it out?

9 A. Yes, I do. These are internal -- sorry. Now go back up.
10 Yes. These are legal entity financials that we've used as part
11 of our consolidation. And on the bottom section, which is
12 where I think you're going, is where these cost allocations are
13 that I was referring to when I was being asked the question.

14 Q. And there are three down at the bottom, consolidated year
15 '16, '17, and '18, correct?

16 A. Correct.

17 Q. And Major is one of the entities identified in the
18 functional group. Is that fair?

19 A. Yes. And Major would have been our internal name for all
20 three of the legal entities.

21 Q. Right. So the corporate allocation for Major in year
22 2018 -- that's highlighted -- is about 1.7 million. Is that
23 correct?

24 A. Yes.

25 Q. And then, James, if you click on the tab for '17, go down

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1 to the same line. And then you have about 1.8 million for
2 2017?

3 A. Yes.

4 Q. Then 3.5 million? Is my math right?

5 A. Yes.

6 Q. '16. Go to Major. We've got 447. Do you see?

7 A. Yes. That's the basis for the 4 million I was referencing.

8 MR. BROWN: Your Honor, should we keep going?

9 THE COURT: You can go another five or ten minutes.

10 Q. Let's talk a little bit about some of the employee
11 departures that Mr. Dahan asked you about. Let's start with
12 Mr. Alper. Do you understand that Mr. Alper was fired?

13 A. Yes.

14 Q. Who fired him?

15 A. Technically I'm the one that was on the phone to make the
16 termination call, but at the directive of Mr. Horowitz and
17 Mr. Wiederman.

18 Q. Do you recall Mr. Horowitz and Mr. Wiederman asking you,
19 Spark, to write a letter to Mr. Alper that said Spark?

20 THE COURT: Did you finish your question?

21 MR. BROWN: No. Let's pull up DX 559.

22 Q. This is an e-mail thread.

23 MR. BROWN: James, scroll down to the next page. And
24 keep going. OK. Second page.

25 Q. So this is Mr. Horowitz sending an e-mail to Mr. Melman on

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1 April 27, 2017, copying Mr. Wiederman, correct?

2 A. Yes.

3 Q. Mr. Melman was general counsel of Spark at the time.

4 A. Yes.

5 Q. And the subject is Dan Alper.

6 A. Yes.

7 Q. And Mr. Horowitz is writing to Mr. Melman, and he's giving
8 him proposed draft language for Mr. Alper's termination. Did
9 you understand that at the time?

10 A. Slight nuance. He's giving language to provide comfort to
11 Gil and I that, you know, requesting that we terminate Dan.
12 But I don't believe any of this language was ever designed to
13 go into a letter to Dan.

14 Q. Right. That's where I'm going. So Mr. Horowitz sends
15 this.

16 MR. BROWN: You can close that, not the whole
17 document, just the box. And then if we go up a little bit.

18 Q. Mr. Melman responds and says, "Saul, this doesn't work for
19 me. That being said, I hear your concerns so I've reworked
20 what I wrote to be significantly more palatable to you. Accept
21 the changes and put it in an e-mail and we are done." Do you
22 see that?

23 A. Yes.

24 Q. And then if we go to the last page of the document, it's
25 the letter that actually gets sent to Mr. Alper. We can blow

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1 that up.

2 A. I don't believe this letter goes to Alper. That's what I'm
3 correcting. I think this is an internal letter --

4 Q. Yes, right.

5 A. -- from Mr. Horowitz and Mr. Wiederman to myself.

6 Q. Correct.

7 MR. BROWN: And blow that up. I misspoke.

8 Q. So this is a letter that Mr. Horowitz and Mr. Wiederman
9 sent to you on April 27 that now says, "On behalf of the Major
10 companies, we," Mr. Horowitz and Mr. Wiederman, "are requesting
11 that Spark terminate the employment of Dan Alper immediately."
12 Do you see that?

13 A. Yes.

14 Q. So Mr. Horowitz and Mr. Wiederman are asking Spark, you, to
15 terminate Mr. Alper.

16 A. Yes.

17 Q. And Mr. Wiederman and Mr. Horowitz tell you, "As per our
18 prior communication, we mutually agree that this course of
19 action is in the best interest of Spark Energy and the Major
20 companies because Dan's skill set is not necessary going
21 forward." Do you see that?

22 A. Yes.

23 Q. And this is less than three months after Mr. Alper was paid
24 over \$2 million for his severance?

25 A. Correct, and rehired to be the CEO of Major Energy.

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1 Q. And Mr. Horowitz and Mr. Wiederman also confirmed that
2 Mr. Horowitz has consulted with the previous members of the
3 Major companies in making the decision. Do you see that?

4 A. I see that.

5 Q. Did you have an understanding who he was referring to?

6 A. I assume that was the other shareholders.

7 Q. And then you see that, in the second paragraph,
8 Mr. Horowitz and Mr. Wiederman saying, "We also agree that the
9 sellers will not allege or make any claim under the MIPA, the
10 earnout agreement, or otherwise that taking this action reduces
11 or jeopardizes the earnout under the MIPA or restricts the
12 Major companies from operating in accordance with Section 2.7
13 of the earnout agreement or otherwise interferes with the
14 operation of the Major business." Did I read that correctly?

15 A. Yes.

16 Q. And what they also wrote to you, at the end, is, "Any costs
17 of this decision, such as legal fees or other expenses, will be
18 a reduction to the adjusted EBITDA of the Major companies for
19 purposes of calculating earnouts and installments under the
20 MIPA?" See that?

21 A. Yes.

22 Q. And did you receive this letter?

23 A. I received this letter.

24 Q. So let's turn to DX 734. DX 734 is an e-mail exchange
25 you're having with Mr. Moeller in July of to 18. Do you see

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1 that?

2 A. Yes.

3 Q. And Mr. Dahan asked you some questions about Mr. Moeller
4 leaving the company as a key employee. Correct? Do you recall
5 those questions?

6 A. Yes.

7 Q. Do you recall when Mr. Moeller actually left the company?

8 MR. DAHAN: Objection, your Honor. I did not ask
9 about -- it was Esther Moeller, not Levi Moeller.

10 THE COURT: OK.

11 MR. DAHAN: That's not the person -- we're not
12 alleging Mr. Levi Moeller's departure was due to Spark. Nor
13 are we alleging that Dan Alper's firing was due to Spark. So I
14 don't know what the point is, but we'll listen to it.

15 MR. BROWN: I believe the document that Mr. Dahan
16 showed, so long Moeller and Alper, and he described them as key
17 employees.

18 MR. DAHAN: No. That was their exercise of their
19 determination rights after the dropdown, not rehired and
20 leaving a year later. That's two different issues.

21 THE COURT: OK.

22 BY MR. BROWN:

23 Q. Do you recall when Mr. Moeller left Major?

24 A. Yes. I believe he left in the middle of 2018 for the
25 second time.

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1 Q. So in the third -- towards the end of the third year.

2 A. Yes.

3 Q. And does this e-mail reflect some communications you were
4 having with Mr. Moeller in July of 2018 in an effort to try to
5 keep him with the Major business?

6 A. Yes.

7 Q. And the discussions you're having in July 2018 with
8 Mr. Moeller, who was the chief operating officer of the
9 business, to keep him with the business, is, if my math is
10 right, about nine months after this lawsuit was filed?

11 A. Yes. That sounds about right.

12 Q. So you're still negotiating with Mr. Moeller and the COO to
13 keep him with the Major Energy business months after sellers
14 sued.

15 A. Yes.

16 THE COURT: It's almost 3:30. Why don't we break for
17 my hearing.

18 As I said, if you could just try to clear some space
19 on your desks. I anticipate this could take a half hour or so.
20 So feel free to, I don't know, go down to the cafeteria, or I
21 don't know if you have a place to go. We'll start back
22 hopefully around 4 o'clock.

23 MR. BROWN: Thank you, your Honor.

24 (Recess)

25 (Continued on next page)

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1 THE COURT: Ok, done with sentencing, back to
2 spreadsheets.

3 All right, Mr. Brown.

4 MR. BROWN: Thank you, your Honor.

5 NATHAN KROEKER, resumed.

6 REDIRECT EXAMINATION (Continued)

7 BY MR. BROWN:

8 Q. We were talking about some of the employees who left the
9 company, and there is one more I want to discuss with you that
10 Mr. Dahan asked you about. Mr. Dahan asked you about Wolbrom
11 leaving the company. Do you recall that question?

12 A. Yes.

13 Q. And he was the chief marketing officer of Major?

14 A. Yes.

15 Q. And do you recall Mr. Dahan said, without discussing why,
16 did you know that Mr. Wolbrom left after the dropdown?

17 A. Yes.

18 Q. And you said without discussing why for several others.
19 Let's look at DX 813.

20 MR. DAHAN: Your Honor, they are going to be
21 introducing a WhatsApp message.

22 MR. BROWN: Wrong document.

23 MR. DAHAN: Then I stand corrected.

24 MR. BROWN: It's the one shown in opening, DX 813.

25 MR. DAHAN: This is a WhatsApp message which the

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1 witness is not on, and he can obviously speculate and try to
2 decipher what the two speakers are stating. And just to say do
3 you see the person said this and said that, I'm not sure what
4 that accomplishes. Mr. Wolbrom will be here at trial. They
5 are welcome to ask him about that. I don't know the point of
6 it.

7 MR. BROWN: I haven't asked the question yet. I would
8 like to ask the questions, and if you don't believe they are
9 evidentially proper, then I'm sure you'll sustain the
10 objection, but --

11 THE COURT: But the WhatsApp message itself, this
12 witness can't authenticate it or provide a foundation.

13 MR. BROWN: But I'm going to show it to him, and I'm
14 going to ask him if he knows certain things about why Mr.
15 Wolbrom did or didn't leave, and he will answer those
16 questions.

17 MR. MAROONEY: He can ask it him without the WhatsApp
18 message.

19 THE COURT: If you're going to connect it up with
20 another witness, I'm fine with your just reading him the text.

21 MR. BROWN: But both authors are going to be here, and
22 we're going to talk to Mr. Sobel and talk to Mr. Wolbrom, and
23 I'm going to ask the CEO because he was asked on cross whether
24 he knows if Mr. Wolbrom left -- without discussing why -- after
25 the transaction.

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1 MR. DAHAN: And the reason I didn't asked is because I
2 recognized I would be asking him to speculate. I try to avoid
3 asking witnesses to speculate.

4 MR. BROWN: Well, one of the core issues in the case,
5 I believe, if I've read their complaint correctly, is that
6 Spark and NGE interfered and caused harm to the company post
7 the dropdown, so I'm simply going to ask the CEO if he knows
8 why Mr. Wolbrom left, and then we will talk to Mr. Wolbrom and
9 Sobel after.

10 THE COURT: OK, you can ask him that. You don't need
11 the WhatsApp message for that.

12 MR. BROWN: So does your Honor not want me to show the
13 witness? Because he has seen the WhatsApp message in
14 connection with discovery, which I will establish through the
15 question.

16 THE COURT: I don't see there is any proper basis to
17 use it now.

18 Q. You were aware Mr. Wolbrom left the company?

19 A. Yes.

20 Q. And were you aware at the time -- strike that. Were you
21 told by anyone at Major at the time why Mr. Wolbrom left the
22 company?

23 A. What I learned -- I don't remember when I learned, but what
24 I understand is that he was frustrated with Major's CEO Dan
25 Alper, and he didn't believe in the business plan, business

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1 strategy and the direction the business and the industry was
2 headed.

3 THE COURT: Did you say Wolbrom? How do you spell
4 that?

5 MR. BROWN: W-o-l-b-r-o-m.

6 THE COURT: I know I've seen it but I forgot how to
7 spell it. OK.

8 A. But every conversation I had with Mr. Wolbrom was positive,
9 cordial, and I have no reason to believe that it had anything
10 to do with myself or with Spark Energy.

11 Q. And I take it outside the discovery in this case have you
12 ever seen any communications between Mr. Wolbrom and Mr. Sobel
13 in 2017?

14 A. Not that I recall.

15 Q. Let's look at PX 458. You will recognize this,
16 Mr. Kroeker, as the July 6, 2017 message forwarding a risk
17 management policy updated June 2016 that Mr. Dahan asked you
18 about?

19 A. Yes.

20 Q. And just a quick question. I want to go to page 2 of the
21 document Mr. Dahan asked about. There we go, it's dated June
22 2016.

23 A. Yes.

24 Q. Was that before or after the MIPA between Spark and NGE was
25 signed?

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1 A. After.

2 Q. How many aggregation deals, to your knowledge -- or do you
3 recall -- did Major Energy propose to either NGE or Spark in
4 target year 2016?

5 A. One. I'm sorry. Year 2016? I don't recall the target
6 year but during the entire earnout period it was one.

7 Q. And is the one the Illinois aggregation deal from 2017 that
8 Mr. Dahan asked you about?

9 A. Yes.

10 Q. And do you recall having discussions with Mr. Moeller about
11 that potential aggregation deal in Illinois?

12 A. I recall the risk committee meeting very clearly. I
13 remember a series of e-mail communications leading up to that
14 risk committee meeting as well.

15 Q. And during the risk committee meeting, what did Mr. Moeller
16 tell you and others on the risk committee about whether or not
17 he as COO would or would not do a deal with aggregation?

18 A. So, he had a couple PowerPoint slides, and the slides laid
19 out the potential benefit to the company of doing the deal both
20 in terms of margin and in terms of customer count. He laid out
21 some of the risks of the deal. When we then had a follow-up
22 discussion to understand those risks and how we would mitigate
23 those risks, the deal seemed overly risky to me for three or
24 four reasons, so I turned the question back to Mr. Moeller and
25 I said, why would you want to do this deal? Like the way

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1 you're presenting it doesn't sound like you really want to do
2 it. I mean why would you want to do this deal? And he said
3 well, truth is if it was up to me, I would not want to do this
4 deal because of these risks but I felt like I had an obligation
5 to bring it to the risk committee.

6 Q. And can we pull up DX 577. This is an e-mail thread
7 between you and Mr. Moeller that begins -- it actually starts
8 down with Mr. -- keep going: OK, there we go.

9 So, Wednesday, May 17 Mr. Moeller is sending Mr. Rao
10 and Mr. Leonard a PowerPoint presentation on the potential
11 Illinois aggregation load deal; is that correct?

12 A. Yes.

13 Q. And then as we scroll up it is forwarded by Mr. Leonard to
14 you that same day, May 17, correct?

15 A. Yes.

16 Q. And then if we continue to scroll up, you write back to
17 Mr. Levi late that night, and with respect to this one
18 aggregation deal in May 2017 you write to Mr. Moeller and say
19 "Thanks for the write-up which does a good job of highlighting
20 both the risks and opportunity. Spark does not have experience
21 serving aggregations, so in advance of the risk committee
22 meeting, can you send me info on any prior aggregations Major
23 has served including" -- and you ask him for a bunch of
24 information about Major's past aggregations they have served,
25 correct?

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1 A. Correct.

2 Q. And then let's scroll up and look at Mr. Moeller's
3 response.

4 Mr. Moeller's first line -- which is the next
5 morning -- says "Major hasn't really been that active with
6 large aggregation deals." Is that right?

7 A. Yes.

8 Q. And then he in the last sentence says with respect to the
9 aggregation load deal in Illinois, "This would be Major's first
10 time to the rodeo." Then he says in parentheses "I can't say
11 that for myself anymore" smilely face "on this type of
12 aggregation." Did I read that correctly?

13 A. Yes. The other pertinent sentence is sentence number two,
14 where he said we purchased a small ESCO. A purchase of a small
15 ESCO is not an aggregation deal, and so he is basically
16 confirming three times they've never done aggregations.

17 Q. And then the Spark risk committee meeting we talked about a
18 moment ago was after this presentation was provided to you, and
19 you talked about this presentation; is that fair?

20 A. Yes.

21 THE COURT: Aggregation deals, again remind me what
22 that is.

23 THE WITNESS: So an aggregation deal you bid on a
24 block of customers. When I say bid, you're not bidding for a
25 purchase price or any form of upfront payment; you're bidding

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1 on how low of a price are you willing to provide or how low of
2 a margin you are willing to take in order to serve that block
3 of customers. And so they tend to be very low-margin deals
4 because there's a highly competitive bidding processes with a
5 lot of retailers, which is why Spark never participated in
6 that.

7 Q. And on that same subject, can you explain to the Court the
8 difference in your view between an aggregation deal and the
9 acquisition of a book of business.

10 A. Yes. So Spark has done several acquisitions of books of
11 business. Major I believe has done one, which Moeller is
12 referencing here. When you're buying a book of customers,
13 you're typically buying those from another retailer, and you're
14 paying some form of an up-front purchase price in order to
15 acquire those customer contacts, and you would keep those
16 customer contracts into perpetuity. Whereas on an aggregation
17 deal you're bidding on lowering your price, on price only, and
18 when those contracts expire those customers revert back to
19 either the utility, the municipality, or to another aggregation
20 deal.

21 Q. James, can we put up DX 580, please.

22 So, then after -- and this is kind of a thread between
23 Mr. Moeller and Mr. Rao, but it closes at the top with Mr. Rao
24 sending Mr. Moeller and Mr. Wiederman at Major an e-mail, and
25 he copies you and Mr. Leonard and Mr. Lane, and it's about

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1 aggregation, on May 22. Do you see that?

2 A. Yes.

3 Q. And this is after the risk committee meeting that happened
4 earlier that afternoon? Do you see that first sentence?

5 A. Yes.

6 Q. And you see that Mr. Rao tells Mr. Wiederman and
7 Mr. Moeller "As discussed, the risk committee would be happy to
8 look at the aggregation deals that are a part of the ongoing
9 business with the customer count of 5,000 or less with no green
10 fee certification requirement." Do you see that?

11 A. Yes.

12 Q. From May 22, 2017 through the close of the earnout at the
13 end of 2018, did Major present any other aggregation deals for
14 consideration?

15 A. I don't believe so.

16 Q. Could you put up DX 539.

17 I know Mr. Dahan asked you some questions about the
18 April 11th memo that Mr. Lancaster prepared that you then
19 forwarded to Mr. Wiederman and Mr. Horowitz on April 12, 2017.
20 And I only have a couple questions here.

21 In the second large paragraph of your e-mail there is
22 a reference in here to the use of Major's year-end customer
23 count of 167,152, which we now agree is correct and consistent
24 with the way Major has always counted its customers. Do you
25 see that?

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1 A. Yes.

2 Q. And when you wrote this to Mr. Wiederman and Mr. Horowitz
3 on April 12, 2017 about this customer count, what were you
4 intending to communicate?

5 A. So, there was a lot of confusion around how Major had been
6 counting their customers. If you look at the MIPA or the
7 earnout agreement -- I don't recall which one -- it says actual
8 customer count, a defined term, but it doesn't actually specify
9 how to calculate that customer count; it just says in
10 accordance with past practices and methodologies.

11 As we were getting into this first year earnout
12 calculation, you will see -- it's all been produced in the
13 evidence -- lots of e-mail communications and lots of
14 discussion around how to properly account for customer count.
15 There is different ways of doing it across the industry. What
16 we saw in the evidence is that even within Major and within
17 Major's management team they have different methodologies for
18 counting customer counts.

19 We had put together the original earnout calculation
20 using what we believed to be the best approach for actual
21 customer count with the way the industry defines those customer
22 counts because we did not understand how Major's past practices
23 and methodology were applied. We knew there were differences,
24 we knew there were inconsistencies, but we couldn't get to a
25 straight answer on what that was. So, we just used the

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1 industry approach, which was to count those customers that are
2 on flow as of December 31.

3 Q. And when you say on flow, do you mean actually taking --

4 A. Receiving electricity or natural gas from Major Energy.

5 Q. Does the phrase "pending active" mean something to you in
6 the industry?

7 A. Yes. In the industry you get electronic transactions from
8 the utility that notify you that you will be receiving a
9 customer at some future date. You get the same thing when a
10 customer leaves; you get an electronic transaction from the
11 market that says you will be losing a customer at some future
12 date. And so what Spark has always done, what I believe most
13 industry participants do, is they count customers when they're
14 actually on flow.

15 What Major has stated in a lot of this evidence is
16 that they count the customer from the time they receive that
17 market transaction.

18 There is another piece of evidence in this case from
19 Sobel that says, OK, we take the market transaction but then we
20 back out 15 days of attrition. And we know from historical
21 data that Major loses 14 or 15 percent of their customers in
22 that first 15 days.

23 So, you can see there are three or four different ways
24 that Major was themselves doing the customer count at year-end
25 2016. The 164 that we used in the earnout calculation was

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1 using industry standard, on flow, which is actual customers.
2 This -- you know, after days of confusion around customer
3 count, I had Mark Wiederman provide me with his view of
4 customer count, which is this 167,152. And rather than debate
5 that, because it's very close to the other methods we had, we
6 said, fine, we will take that.

7 What we have seen as part of the discovery in this
8 case is, again, that wasn't done consistently with how they had
9 done it historically. It doesn't back out 15 days worth of
10 attrition, and I think there is still some confusion about what
11 exactly that 167,152 is.

12 Q. This April 12 communication is after the wiring of the \$7.4
13 million under the reservation of rights?

14 A. Yes.

15 Q. And Mr. Dahan asked, and I think you told him, you had many
16 communications with both the sellers and internally between
17 March 30 and when you sent this e-mail April 12? Is that fair?

18 A. Yes, we had a lot of conversations, conference calls, in
19 that two week window.

20 Q. And do you recall having discussions in that two week
21 interim period with the sellers about customer count disputes?

22 A. Yes.

23 Q. And do you recall having discussions with the sellers in
24 that two week time period about whether or not 2.2(b) should or
25 shouldn't be applied?

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1 A. Yes. At this point we said, fine, we'll exclude 2.2(b),
2 we'll take Mark's number for customer count; let's see if we
3 can do the calculation correctly.

4 Q. Prior to signing the dropdown MIPA with NGE on May 3, 2016,
5 as CEO of Spark HoldCo, did you know that Major Energy counted
6 customers differently internally?

7 A. No.

8 Q. Can we look at DX 703. Mr. Dahan asked you some questions
9 about Spark agreeing to transfer some customers for Major
10 Energy's benefit during target year 2018. Do you recall those
11 questions?

12 A. Yes.

13 Q. And is this an e-mail communication that he sent to Mr.
14 Wiederman communicating the view you had about the deal points
15 on that transfer?

16 A. Yes.

17 Q. So, James, can we go to the start of the thread. I guess
18 it's page 3.

19 So page 2, the thread starts with Mr. Wiederman,
20 Mr. Horowitz and Mr. Moeller internally discussing things. It
21 eventually gets forwarded to you.

22 So Mr. Wiederman says to Mr. Horowitz, "Saul, as per
23 our conversation, during our call with Nathan, Levi and I
24 suggested that due to the New York resetting order we felt it's
25 an opportune time to switch HIKO and some of the other Spark

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Kroeker - redirect

1 family of companies customers to Major as well as bringing over
2 the 3 HIKO employees to the Orangeburg office. In turn for
3 this, Major will be credited for the HIKO customers and 100K
4 will be added to Major's 2018 EBITDA. Levi and I believe this
5 is a win win situation. Please let us know."

6 Did I read that correctly?

7 A. Yes.

8 Q. So this is Mr. Wiederman purposing this to Mr. Horowitz,
9 and he describes it as a win win. This is April 10, 2018,
10 correct?

11 A. Yes.

12 Q. This is give or take five months after the sellers sued
13 Spark and NGE, correct?

14 A. Correct.

15 Q. The next e-mail, this is Mr. Horowitz responding to Mr.
16 Wiederman and Mr. Moeller, and Mr. Horowitz in hear says "If
17 you and Levi feel this would be advantageous to our company
18 then go ahead." Then Mr. Horowitz seems to communicate to Mr.
19 Wiederman and Mr. Moeller that in his view they are in
20 litigation, there is interference, we don't trust them, so just
21 be careful.

22 Is that a fair encapsulation? I see Mr. Dahan shaking
23 his head so I think we all agree.

24 A. Yes.

25 Q. OK. So then Mr. Wiederman, to continue on the thread,

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Kroeker - redirect

1 said -- he forwards that to you, so he forwards his and Mr.
2 Moeller's, and he also forwards Mr. Horwitz's views to you and
3 says, "Nathan, please see below and let me if you have a few
4 minutes to discuss." Do you see that?

5 A. Yes.

6 Q. And then you respond with the document that we were looking
7 at. And did you in your response to Mr. Wiederman and
8 Mr. Moeller engage with Mr. Horowitz on his accusations against
9 Spark?

10 A. No.

11 Q. What did you try to communicate in this e-mail back to Mr.
12 Wiederman and Mr. Moeller about what you were trying to do for
13 Major's and Spark's benefit in April 2018 post-litigation?

14 A. I mean we're trying to run a business, and I have an
15 obligation to talk through changes like this with management in
16 good faith and how do we get to a resolution that's good for
17 Major, good for Spark, makes business sense. So what I'm
18 trying to do is lay out very clearly so there is no confusion
19 exactly what we had talked about on the phone earlier that day
20 or the day prior, and that is, you know, whatever gross margin
21 they get from those customers, plus the customer count, plus
22 \$100,000 just to cover any time and expenses they may have
23 incurred in taking this over. Keep in mind, they're not having
24 to pay for the three employees; they're not having to go
25 anywhere or do anything. Mark and Levi assured me that this is

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Kroeker - redirect

1 something they could oversee with virtually no disruption to
2 the business, and so that's why we decided collectively this
3 was a good move going forward.

4 Q. The win win that Mr. Wiederman described.

5 A. Yes.

6 Q. So let's go up to the last e-mail which is Mr. Wiederman's
7 response to you and says, "Nathan, Levi and I agree with the
8 points outlined in your e-mail." And that was the deal that
9 was reached; is that fair to say?

10 A. Yes.

11 Q. Let's go to DX 1045. DX 1045 is an e-mail that starts
12 between you and someone named Cory Byzewski copying Dan Alper
13 from March 15, 2017. Do you see that?

14 A. Yes.

15 Q. And then you see at the top Mr. Alper responds to you later
16 that day and says "Things have been going well with Cory. I am
17 really glad he is here."

18 Do you see that?

19 A. Yes.

20 Q. And he says "Good call"?

21 A. Yeah.

22 Q. Do you recall what this was referring to?

23 A. Absolutely.

24 Q. What was it referring to?

25 A. In late 2016 I had three senior executives at Major Energy

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Kroeker - redirect

1 trigger their termination provisions within their employment
2 contracts. We all remember that.

3 I have three senior executives leave. I was going
4 through a process of trying to figure out if I could rehire
5 them. I had two other sellers that are still executives that I
6 don't know if I'm going to stay or leave. I mean I've got a
7 very large asset that I've just paid a lot of money for where
8 I've got five senior executives either out the door, maybe out
9 the door, or at risk in some way, shape or form. I briefed my
10 board on that. My board said you've got to find a way to
11 de-risk that asset; I don't care if you have to go up to New
12 York, or you find somebody from your team to go up to New York,
13 but you need to de-risk that in case those guys leave.

14 And I knew, given their status of the relationship at
15 that point, it wouldn't be welcomed if I put somebody from
16 Houston there. Cory Byzewski is a gentleman I have known for
17 15 years, extremely knowledgeable of this industry, has been in
18 this industry for a long time, plus he had the personality and
19 the demeanor that I thought he would blend in well with the
20 team in New York. He currently lives in Florida. I paid for
21 Cory to commute up to New York every week, paid for his time,
22 his flights, his accommodations, to go to New York, to work
23 directly for Dan Alper and basically do anything and everything
24 that Dan saw as appropriate for him as a member of Dan's team.
25 I never asked Cory to report back to me. I never wanted him to

K337HOR5

Kroeker - redirect

1 be viewed negatively by Major.

2 What Dan related to me was that the sellers felt that
3 Cory was a spy, so I took great pains to never have
4 conversations with Cory other than to say are you showing up
5 for work, OK, great. Otherwise all my communications went
6 through Dan.

7 All I was doing was trying to make sure that if Dan,
8 Levi, Sobel, anyone else left, I had some knowledge of this
9 business, its systems, its operations, its vendors, something
10 to protect the value of our investment in this case. So that's
11 the background on Cory Byzenski.

12 Q. And so Mr. Byzenski then provides services to Major Energy
13 that Spark pays for?

14 A. Absolutely. I don't have visibility into exactly what he
15 was doing -- he was under Dan's direction that entire time --
16 but Spark paid for it.

17 Q. And can we look at DX 926 and it's a native. DX 926A, do
18 you recognize this as a summation of invoices that Mr. Byzenski
19 sent and that Spark paid totaling \$178,000?

20 A. That looks correct.

21 Q. Sorry, Mr. Kroeker. That totals \$178,139.79?

22 A. Yes.

23 Q. That was for the services he provided to Major that Spark
24 paid for?

25 A. Yes.

K337HOR5

Kroeker - redirect

1 Q. Just a couple more questions, sir.

2 PX 476, if you go to -- so this is -- yeah, so this is
3 communication between you and Mr. Horowitz and Mr. Wiederman
4 about add backs in connection to the 2016 net adjusted EBITDA,
5 correct?

6 A. Yes.

7 Q. And this is part of what you talked about with Mr. Dahan as
8 the communication that continued until a period of time where
9 Mr. Horowitz said we're at a stalemate?

10 A. Correct.

11 Q. And one of the add backs in this document relates to the
12 \$250,000 add back for the EMS integration; is that correct?

13 A. Yes.

14 Q. And so, James, if you can forward us to the next page.
15 Keep going.

16 A. I think paragraph 7 is what you're looking for.

17 Q. Thank you. So in paragraph 7 this is a response from you;
18 is that correct?

19 A. Yes.

20 Q. And you say to Mr. Horowitz, "Spark agreed to add back a
21 portion of these travel expenses which has already been
22 factored into the \$250,000 add back." Do you see that?

23 A. Yes.

24 Q. And that add back for \$250,000 related to Spark paying
25 essentially Major an add back in connection with the EMS

K337HOR5

Kroeker - redirect

1 integration project that stopped in September 2016?

2 A. Correct. Can I clarify? That was a component of it, but
3 the way it was characterized was it was incremental costs that
4 were strictly as a result of Spark acquiring the business, so
5 there were some fees associated. PWC had the issue of consent
6 letter, I believe, a couple other nits and gnats like that, but
7 the primary issue was this EMS project.

8 MR. BROWN: Give me one second.

9 THE COURT: Sure.

10 Q. Do you recall, Mr. Kroeker, at the end of 2017 asking Mr.
11 Wiederman if you could attend the Major Energy holiday party?

12 A. Yes.

13 Q. To give gifts to some of the Major Energy folks?

14 A. Yes.

15 Q. And did Mr. Wiederman tell you whether you could attend or
16 not?

17 A. Mr. Wiederman told me I would not be welcome to attend the
18 holiday party; it's a small company; they have a small company
19 culture; it would be awkward if I were there; and he asked me
20 not to attend. Though what I did in lieu of that is I flew up
21 there a day or two early, ordered in lunch for the entire
22 employees and handed out the cash gifts at that point that I
23 had intended to do at the holiday party.

24 Q. Could we pull up DX 665.

25 DX 665 is Mr. Wiederman's e-mail to Mr. Horowitz on

K337HOR5

Kroeker - redirect

1 November 21, 2017 saying, "Levi and I were talking with Nathan
2 this morning on a weekly call and he asked us to clear the
3 following with you. Do you see any issues with him coming to
4 the holiday party and giving out gifts to the employees? Are
5 you OK with it?" and Mr. Horowitz responds "What's the point of
6 that? I don't think it helps our case."

7 Do you see that? Do you see that?

8 A. I see that.

9 Q. Did Mr. Wiederman tell you during your conversation about
10 the holiday party that Mr. Horowitz didn't think you attending
11 the holiday party would help the case they had filed against
12 Spark and NGE?

13 MR. DAHAN: Objection.

14 THE COURT: You can answer if you understand the
15 question.

16 A. I don't believe that's what he said. He wasn't that
17 specific.

18 MR. BROWN: I pass the witness. Can I move in any
19 exhibits?

20 THE COURT: Sure.

21 MR. BROWN: DX 944, along with A, DX 1021, DX 866
22 along with A, DX 70, DX 483, DX 470, DX 607.

23 THE COURT: Hold on. You have 470. OK, what was
24 after 470?

25 MR. BROWN: Oh, I'm sorry, it was PX 470.

K337HOR5

Kroeker - redirect

1 DX 607, DX 981, DX 923, along with A, DX 559, DX 734,
2 DX 813, PX 458.

3 THE COURT: Hold on one second. I think I lost you.
4 You said DX 813?

5 MR. BROWN: Yes. I'm sorry, that's the Wolbrom chat.
6 Strike it. DX 813 is not in evidence.

7 THE COURT: OK. Next one.

8 MR. BROWN: Sorry. PX 458. DX 577, DX 580, DX 539,
9 DX 703, DX 1045, DX 926 and A, DX 476.

10 THE COURT: Was that PX 476?

11 Let me ask my scribner. PX. And finally DX 665.

12 THE COURT: OK, they're received.

13 MR. BROWN: Thank you.

14 (Defendant's Exhibits DX 944, DX 944A, DX 1021, DX
15 866, DX 866A, DX 70, DX 483, DX 607 received in evidence)

16 (Defendant's Exhibits DX 981, DX 923, DX 923A, DX 559,
17 DX 734 received in evidence)

18 (Defendant's Exhibits DX 577, DX 580, DX 539, DX 703,
19 DX 1045, DX 926, DX 926A received in evidence)

20 (Plaintiff's Exhibits PX 470, PX 458, PX 476 received
21 in evidence)

22 (Continued on next page)

33AHOR6ps

Kroeker - Recross

1 THE COURT: Any recross? Mr. Dahan?

2 MR. DAHAN: I'll be brief.

3 RECROSS EXAMINATION

4 BY MR. DAHAN:

5 Q. Mr. Kroeker, you were talking earlier about due diligence
6 that Spark would have done in connection with the dropdown.

7 A. Yes.

8 Q. Let me just make sure I understand your testimony. Is it
9 your testimony that before the dropdown, Spark didn't do any
10 due diligence with respect to the projections that were
11 received from Major?

12 A. No. That's not my testimony. We would have done the due
13 diligence before signing the MIPA on May the 3rd.

14 Q. That's right. And in fact, in the 14C -- let me go through
15 it again -- you discussed this considerable due diligence that
16 Spark did. Isn't that correct?

17 A. Sorry. You're referencing 14C?

18 Q. Yes. The 14C filing, filed on August 3, 2016? Remember
19 that little filing --

20 A. Yes.

21 Q. -- telling shareholders about the potential dropdown?

22 A. Yes.

23 Q. Remember the background of the transaction section had a
24 lot of diligence discussions in there?

25 A. Yes.

33AHOR6ps

Kroeker - Recross

1 Q. In fact, the Spark independent committee hired out the
2 financial advisor, correct?

3 A. Yes.

4 Q. You talked about the way the customer --

5 A. I'm sorry. I didn't hear the question. I was agreeing on
6 following your question. I don't feel like I answered your
7 question.

8 Q. Did they hire a special financial advisor?

9 A. The special committee?

10 Q. Yes.

11 A. Yes, they hired a financial advisor.

12 Q. You talked earlier about customer spend and how Spark does
13 its customer spend versus how you understand Major Energy does
14 its customer spend. Right?

15 A. Yes.

16 Q. You reviewed the earnout agreement, right?

17 A. Yes.

18 Q. You've seen Section 2.7?

19 A. Yes.

20 Q. And you recall the provision in 2.7 that says that buyer
21 has a duty of good faith and fair dealing nonetheless to
22 operate the business of the companies in all material respects
23 throughout the target years such that the companies are
24 operated consistently with how the senior management team
25 operated the companies before closing?

33AHOR6ps

Kroeker - Recross

1 A. Yes. I'm very familiar with that.

2 Q. And in fact also how the senior management team suggests to
3 operate the companies going forward to adapt to new
4 opportunities. Correct?

5 A. Yes.

6 Q. So, for instance, if aggregation was a new opportunity,
7 that also would potentially fall into 2.7, correct?

8 A. Yes. And I believe I followed the letter of 2.7. It was
9 duty of good faith. We listened to the opportunity. I took
10 the recommendation of Major's COO. And that was the decision.

11 Q. So, again, did the management of Major Energy tell Spark to
12 impose a 5,000 cap?

13 A. No. I think you're making a very big deal out of the 5,000
14 cap. That was an e-mail discussion. That was a guideline.
15 But they never came to me and said, hey, we've got almost 5500,
16 would you consider. I mean, they never, ever brought any
17 additional aggregation deals forward.

18 Q. You talked before about the --

19 A. The 5,000 wasn't part of the risk committee meeting. We
20 said smaller deals that are less risky.

21 Q. We can pull up that e-mail again, the language.

22 A. I know what it said. I'm relaying what the discussion was
23 in the risk committee meeting.

24 Q. OK. You were shown the Houlihan projections. Remember
25 that?

33AHOR6ps

Kroeker - Recross

1 A. Yes.

2 Q. And that's DX 541?

3 MR. DAHAN: Can we pull that up. And if you could go
4 to, I guess, would it be HL145.

5 Q. I think you testified that Houlihan reviewed or relied upon
6 the Major Energy projections in performing this analysis,
7 correct?

8 A. I believe that's the case.

9 Q. But that's not all it reviewed. Isn't that true?

10 Right? There's more than one bullet on this page.
11 Right?

12 A. Correct.

13 Q. If we could go to DX 8666. So this was an e-mail you were
14 shown earlier about Major Energy's determination of potential
15 customer drops relating to the low-income order?

16 MR. BROWN: Objection, mischaracterization.

17 MR. DAHAN: Why don't we just look at what this e-mail
18 was, right.

19 So let's go to the next page.

20 Q. And you were shown low-income drops, and I think your
21 counsel suggested that, adding it up, there was about 6900. Do
22 you remember that?

23 A. Yes.

24 Q. OK. Do you see any drops for 2016?

25 A. I don't see in here.

33AHOR6ps

Kroeker - Recross

1 Q. Right. And can you total how many customers drops there
2 were for 2017? It's 155?

3 A. Yes. It's 155.

4 Q. And do you recall from paragraph 244 of your witness
5 statement what was the missed in customer from projected to
6 actual for 2017?

7 A. I don't remember the exact number, counsel. I'd have to go
8 look. You said 244?

9 Q. Yes. So you projected -- it's 209, actual 159.

10 A. Correct.

11 Q. Is that about 50,000?

12 A. That's about 50,000.

13 Q. Now, some of this has 2019 in there, right? The bottom
14 three?

15 A. Yes.

16 Q. And I'm a lawyer so I'm definitely not doing that, but
17 that's --

18 A. A couple million.

19 Q. Yes, something over a thousand, right? Or close to 2,000.

20 So if you deduct that, so maybe it's about --

21 MR. BROWN: Objection, characterization. The 7,000
22 approximate number that I represented is for the earnout period
23 for 12/2018, didn't include the three --

24 MR. DAHAN: Then I apologize.

25 Q. So let's assume it's 6900. Looking back at your paragraph

33AHOR6ps

Kroeker - Recross

1 244, do you recall how much was missed between projected and
2 actual for 2018?

3 A. About 111,000.

4 Q. You were shown DX 70. Can we pull that up. So just so
5 we're clear, you were shown the e-mail that talked about a
6 dropdown, correct?

7 A. Yes.

8 Q. And this was during a negotiation that Spark was doing in
9 2015, February 2015 around this time, correct?

10 A. Yes.

11 Q. And just so we're clear, that was not the transaction that
12 occurred between November 2015 and April 2015; isn't that true?

13 A. I mean, the transaction --

14 Q. Sorry.

15 A. Can you restate the question?

16 Q. That was not the transaction that closed in 2016, correct?

17 A. Correct.

18 Q. And since Georgian Hodges was not involved in that, in the
19 negotiations of the NGE seller transaction, correct?

20 A. Correct.

21 Q. And --

22 A. Well, hang on. So let me restate. Is it the same
23 transaction? I'm -- potentially. Right. I mean, the dropdown
24 structure would have looked very similar to what ultimately
25 played out in 2016. The difference is we had different people

33AHOR6ps

Kroeker - Recross

1 having the conversations in '15. Had we gone forward with the
2 dropdown transaction, it would have included NG&E, but the
3 Pennsylvania order came out and everything stopped.

4 Q. And by the way, that Pennsylvania order that we've already
5 established, you saw that January 2016 presentation, right?

6 A. Yes.

7 Q. And at that time, that was being resolved, in fact there
8 was a litigation hold specific for that, correct?

9 A. Sorry. You said in January of?

10 Q. 2016. You saw that January 2016 presentation, you
11 remember?

12 A. Yes.

13 Q. And again at that point in time, of the January 2016
14 presentation, NGE was willing to pay \$16 million cash at
15 closing, correct?

16 A. Correct.

17 The New York order was not yet known at that point in
18 time, and the Illinois AG matter were not yet known at that
19 time. And if you look at Major's projections and their
20 existing business, they had a high concentration in New York,
21 and their projections had a high concentration in Illinois.

22 So.

23 Q. That --

24 A. So when -- can I finish my answer?

25 Q. Sure.

33AHOR6ps

Kroeker - Recross

1 A. So when you had a significant adverse regulatory action in
2 your primary action and another significant adverse regulatory
3 action in your primary growth market, there is going to be a
4 material change to the business.

5 Q. Right. And just so we're clear, again, those regulatory
6 issues in New York were the resetting order and the low-income
7 order, correct?

8 A. In New York, yes, both of which prompted action on the part
9 of management during the earnout period.

10 Q. Now, we talked about PSE, and you were shown documents
11 about different pricing.

12 A. Yes.

13 Q. Between what PSE was offering versus -- just out of
14 curiosity, is it your understanding that when an ESCO chooses a
15 supplier, it's just about price?

16 A. No.

17 Q. Right?

18 Now, you talked about the notices that were sent by
19 Major Energy in September of 2016, by PSE of the exercise of
20 the termination right, right?

21 A. Correct.

22 Q. Do you recall who sign those notices?

23 A. I don't recall. It's in the evidence. Let's look and see
24 who did.

25 Q. PX 675. It's Major Energy. You see that?

33AHOR6ps

Kroeker - Recross

1 A. Yes.

2 Q. Can you read the signature line.

3 A. Yes. That's my signature.

4 Q. Let's look at the next page. Who signed that one?

5 A. Is this the second one?

6 Q. Yes.

7 A. OK. That's me.

8 Q. Look at the next one. Who signed that one?

9 A. That's me.

10 Q. Talked about the customer account. Right?

11 A. Yes.

12 Q. We again established you reviewed the earnout agreement,
13 right?

14 A. Sorry, can you say that again?

15 Q. You reviewed the earnout agreement, correct?

16 A. Yes.

17 Q. Let's look at PX 634. And if you go to 04, you see there's
18 a definition for year-end customer accounts. See that?

19 A. Yes.

20 Q. Can you read that definition, please.

21 A. Yes. This is what I was paraphrasing earlier.

22 Q. But just I'd like you to read it without the paraphrasing.

23 A. OK. "'year end customer accounts' means the actual number
24 of customer accounts calculated as of the end of each target
25 year. The actual number of customer accounts shall be computed

33AHOR6ps

Kroeker - Redirect

1 in a manner consistent with the procedures, practices,
2 methodologies, and standards used by the companies in
3 calculating their customer accounts before closing."

4 Q. OK. And now my question to you is, one thing we can agree
5 on, it doesn't say, to be computed in a manner consistent with
6 how the industry does it. Correct?

7 A. No. It says "actual number of customers."

8 Q. It doesn't say it should be in a manner consistent with how
9 Spark does it, does it?

10 A. No. As I said, we did our best to try to figure out what
11 was the procedures, practices, and methodologies, and standards
12 used by Major. And what we found out was, there was no
13 consistent approach, prior to the transaction closing.

14 MR. DAHAN: I have nothing further, your Honor.

15 THE COURT: All right. Thank you.

16 Any re-redirect?

17 MR. BROWN: One question, your Honor.

18 REDIRECT EXAMINATION

19 BY MR. BROWN:

20 Q. Mr. Kroeker, Mr. Dahan just asked you again about the New
21 York resetting order and the low-income order in New York. Do
22 you recall that there was a third issue in New York that was
23 impacting Major Energy's business in connection with an
24 investigation by the New York AG's office for fraudulent
25 marketing practices?

33AHOR6ps

1 A. Yes.

2 Q. And what do you recall about that issue?

3 A. I believe that's, you know, was a significant matter that
4 was dragging on for years, had to do with sales and marketing
5 practices. I don't remember the specifics of it, but I do know
6 that matter was and is a point of contention in this
7 transaction.

8 MR. BROWN: Nothing further, your Honor.

9 THE COURT: All right. Did you mean to move in any
10 new exhibit? Was PX 675 new, Mr. Dahan? Or is that already
11 in?

12 MR. MAROONEY: Yes. Sorry. I'd like to move that in,
13 your Honor, the termination letters. Thank you for --

14 THE COURT: PX 675 is received.

15 (Plaintiff's Exhibit 675 received in evidence)

16 THE COURT: I think the other ones were already in
17 evidence?

18 MR. DAHAN: Yes.

19 THE COURT: All right. Nothing further for this
20 witness?

21 MR. DAHAN: No.

22 THE COURT: Thank you, sir. You may step down. You
23 can leave everything there.

24 (Witness excused)

25 THE COURT: And shall we break for the day?

33AHOR6ps

1 MR. DAHAN: Yes.

2 THE COURT: So what's next?

3 MR. DAHAN: So, tomorrow, we'll be starting with
4 Mr. Wiederman, so I guess defendants will start their cross.

5 MR. BROWN: And I guess one question, your Honor, that
6 Mr. Dahan and I were discussing during the sentencing here was,
7 Mr. Wiederman will be a longer witness, after which the rest
8 will be shorter witnesses in this case. And we have three
9 witnesses we need to finish on Wednesday which are shorter
10 witnesses. Would your Honor be willing to start any earlier
11 than 9:30? I don't know your schedule for tomorrow. We could
12 try to get Wiederman done and then shotgun the last three
13 witnesses, colloquially speaking.

14 THE COURT: The last three witnesses in plaintiff's
15 case?

16 MR. BROWN: The last witnesses for the day Wednesday.

17 MR. DAHAN: Unless your Honor is ready to rule.

18 It would be Mr. Maxwell.

19 THE COURT: So Maxwell is next.

20 MR. DAHAN: That was the plan. And then the other two
21 that we need to get on are Robert Lane, and it was actually in
22 the defendant's case but we were going ahead, and it was Todd
23 Gibson.

24 THE COURT: So that would be the order next.

25 MR. BROWN: Yes.

33AHOR6ps

1 THE COURT: So you're proposing we start at, say, 9?

2 MR. BROWN: Works for us.

3 THE COURT: Yes. We can start at 9 tomorrow. Sure.

4 Tomorrow, the only other matter I have is another
5 sentencing at 12:30. So we can take our lunch break from 12:30
6 to 1:30 or so. And other than that, we should be able to go
7 straight through pretty much other than a bathroom break here
8 or there. All right?

9 MR. DAHAN: Thank you, your Honor.

10 THE COURT: OK. Have a good night.

11 (Adjourned to 9:00 a.m., March 4, 2020)

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PLAINTIFF EXHIBITS

Exhibit No.	Received
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PX 161 and PX 524	245
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PX 196	256
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251, 457, 756, 655, 256, 257, 316, 312, . . .	367
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314, 299, 313, 481, 359, 650,	
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651, 656, 458, 641, and 641A	
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PX 470, PX 458, PX 476	435
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675	446
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DEFENDANT EXHIBITS

Exhibit No.	Received
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DX 1, DX 272, DX 298, DX 390, DX 503,	245
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DX 516	
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DX 518, DX 698, DX 962, DX 1033, DX 408 . .	245
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1 2, 1028, 1028A, 541, 998, 395, 395A, 367

2 and 539

3 DX 944, DX 944A, DX 1021, DX 866, DX 435

4 866A, DX 70, DX 483, DX 607

5 DX 981, DX 923, DX 923A, DX 559, DX 734 . . 435

6 DX 577, DX 580, DX 539, DX 703, DX 435

7 1045, DX 926, DX 926A